Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SHAWNEE TRAIL CONSERVANCY, ILLINOIS TRAIL RIDERS, HORSEMEN'S COUNCIL OF ILLINOIS, SOUTHERN ILLINOIS CAMPGROUND AND RANCH OWNERS ASSOCIATION, and ILLINOIS FEDERATION OF OUTDOOR RESOURCES,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; DANIEL GLICKMAN, Secretary of Agriculture; MICHAEL DOMBECK, Chief, U.S. Forest Service; ROBERT JACOBS, Regional Forester, Eastern Region, U.S. Forest Service; and LOUISE ODEGAARD, Supervisor, Shawnee National Forest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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122 pp

ISSUES PRESENTED

1. Whether, in an action challenging the authority of the federal government to regulate property that it does not own, the Quiet Title Act compels that the action be brought under that Act, even though the party bringing the action is not an "adverse claimant"?

2. Whether the futility exception to the common law doctrine of administrative exhaustion is available when a federal statute mandates administrative exhaustion but is silent as to the futility exception?

3. Whether an agreement by which a federal agency has settled a pending lawsuit and in which the agency agrees to undertake specific action, contrary to the interest of a third party, demonstrates either "bias" or "predetermination" so as to render "futile" any administrative appeal by that third party?

LIST OF PARTIES

The following parties were plaintiffs at the U.S. District Court and appellants before the U.S. Court of Appeals for the Seventh Circuit: Shawnee Trail Conservancy, Illinois Trail Riders, Horsemen's Council of Illinois, Southern Illinois Campground and Ranch Owners Association, and Illinois Federation of Outdoor Resources (hereinafter collectively "Shawnee Trail Conservancy"). The following parties were defendants at the U.S. District Court and appellees before the U.S. Court of Appeals for the Seventh Circuit: United States Department of Agriculture; United States Forest Service; Daniel Glickman, Secretary of Agriculture; Michael Dombeck, Chief, U.S. Forest Service; Robert Jacobs, Regional Forester, Eastern Region, U.S. Forest Service; and Louise Odegaard, Supervisor, Shawnee National Forest. The Office of Forest Supervisor formerly occupied by Louise Odegaard is now occupied by Bruce Slover.

STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases that either are pending review or were reviewed previously by this Court.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Seventh Circuit, 222 F.3d 383 (7th Cir. 2000), which appears at pages App. 1 to App. 15 of the Appendix. The opinion and order of the United States District Court for the Southern District of Illinois, No. 98-CV-4248-JPG (July 31, 1999), appears at pages App. 16 to App. 32.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the United States Court of Appeals for the Seventh Circuit on July 25, 2000. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Property Clause of the United States Constitution is involved in this Petition for *Writ of Certiorari*. U.S. Const., art. IV, sec. 3, cl. 2 (App. 33).

STATUTES INVOLVED

The statutes involved in this Petition include the Quiet Title Act, 28 U.S.C. § 2409a, and Section 10(c) of the

Administrative Procedure Act, 5 U.S.C. § 704 (App. 33 to App. 37).

REGULATIONS INVOLVED

The regulations involved in this Petition include a Forest Service regulation, 36 C.F.R. § 217.18 (App. 37).

STATEMENT OF THE CASE

Shawnee Trail Conservancy filed its complaint on July 31, 1998, and its corrected complaint on August 12, 1998, in the United States District Court for the Southern District of Illinois. Shawnee Trail Conservancy challenged Federal Defendants' constitutional and regulatory authority to close certain roads within the Shawnee National Forest ("Shawnee") and to designate certain areas of the Shawnee as Research Natural Areas ("RNAs").

On October 23, 1998, Federal Defendants filed a Rule 12(b)(1) and (b)(6) motion to dismiss the complaint, arguing: Count I, regarding the road closures, should be based upon the Quiet Title Act ("QTA"), not upon the Administrative Procedure Act ("APA"); and Count II, concerning the RNA designations, required administrative exhaustion prior to judicial review.

Shawnee Trail Conservancy responded and opposed the motion to dismiss, arguing: the claim regarding the road closures is founded properly on the APA and not the QTA because it is a challenge to the federal government's constitutional authority to regulate property that it does

not own, not a challenge by an adverse claimant to the government's title to the property; and, as to the claim concerning the RNA designations, the administrative exhaustion requirement should be waived due to futility. Federal Defendants replied.

On July 21, 1999, the District Court granted Federal Defendants' motion to dismiss for lack of subject matter jurisdiction, holding that Shawnee Trail Conservancy's claims challenged the title of the United States to property and must be brought as an action to quiet title. App. 25-26. The District Court also held that exhaustion of administrative remedies was required by section 10(c) of the APA and, after factual inquiry regarding the futility of exhaustion, found that the futility exception did not apply to the facts. App. 27-28.

Shawnee Trail Conservancy timely filed the Notice of Appeal to the U.S. Court of Appeals for the Seventh Circuit on September 13, 1999. After full briefing, oral arguments were conducted before the Seventh Circuit on March 29, 2000. On July 25, 2000, the U.S. Court of Appeals for the Seventh Circuit issued its opinion upholding the decision of the District Court. *Shawnee Trail Conservancy, et al. v. United States Dept. of Agriculture, et al.*, 222 F.3d 383 (7th Cir. 2000) (App. 1-15). The Seventh Circuit held that because Shawnee Trail Conservancy's suit involved a disputed claim to real property in which the United States claims an interest, the suit must be brought under the QTA. *Id.* at 387-88 (App. 9-10). The Seventh Circuit also held that administrative exhaustion was required by section 10(c) of the APA and that the Court did not have the power to waive that requirement through application of an exception to the exhaustion

doctrine. *Id.* at 389 (App. 11-12). Based on its prior holding in *Glisson v. United States Forest Service*, 55 F.3d 1325 (7th Cir. 1995), the Seventh Circuit held that the common law exceptions to the exhaustion doctrine do not apply to the statutorily-mandated exhaustion requirement of the APA. *Id.*

STATEMENT OF FACTS

Shawnee Trail Conservancy consists of five not-for-profit groups concerned with access to federal lands by outdoor enthusiasts, including equestrians, all-terrain vehicle ("ATV") and off-highway motorcycle ("OHM") users, mountain bikers, and hikers. Use of the Shawnee by members of these groups has been denied by Federal Defendants, resulting in the challenge below.

The United States purchased lands that now comprise the Shawnee from private landowners and the State of Illinois in the 1930s and 1940s, under the authority of the Weeks Law, 16 U.S.C. §§ 480, *et seq.* Today, the Shawnee encompasses 265,135 acres at the southern tip of Illinois; it is bounded on the east and south by the Ohio River and on the west by the Mississippi River.

On November 24, 1986, the Shawnee approved its Land and Resource Management Plan ("LRMP"). Four administrative appeals challenging the LRMP were filed by the Sierra Club, Audubon Council, and others. In an effort to resolve the administrative appeals on a local level, the Forest Service held a series of meetings in 1988. On August 15, 1988, the Forest Service entered into a Settlement Agreement with the appealing parties. The

Forest Service and the appealing parties agreed that "this agreement binds them [] as provided herein." Appeal Settlement Agreement between the Forest Service, Eastern Region, and Audubon Council of Illinois, E. Alan Englehart, Illinois Department of Conservation, and Sierra Club, *et al.* ("Settlement Agreement"), August 15, 1988, at 24, App. 38-82, at 79.

Pursuant to the Settlement Agreement, the Atwood Ridge area was designated as a RNA on September 26, 1990, and the Burke Branch area was designated as a RNA on March 14, 1991.

The 1986 Shawnee LRMP ("1986 Plan"), the Settlement Agreement, and the 1992 Shawnee Amended LRMP ("1992 Amended Plan") provide the basis upon which the RNAs are to be managed. RNAs generally must be "retained in a virgin or unmodified condition." 36 C.F.R. § 251.23. Thus, in accordance with the 1986 Plan, Settlement Agreement, and 1992 Amended Plan, equestrian, mountain bike, ATV, and OHM use is restricted to designated trails within the RNAs. Shawnee Trail Conservancy asserts that the RNAs within the Shawnee, including Atwood Ridge and Burke Branch, are not "virgin or unmodified."

In addition, many RNAs, including Atwood Ridge and Burke Branch, contain old county, township, and private roads and rights-of-way established and utilized prior to the designation of the Shawnee in 1933 and designation of the RNAs in 1990 and 1991. The Atwood Ridge Road traverses the Atwood Ridge and is a county road to which members of the public, including private inholders, have ingress and egress rights. The Burke

Branch Road crosses the Burke Branch area and is also a public road. Shawnee Trail Conservancy asserts that Federal Defendants may not regulate those nonfederal public lands.

On January 31, 1997, Forest Supervisor Odegaard issued a closure order that prohibited vehicular and equestrian use of the roads and trails in 40 of the 81 RNAs within the Shawnee, including Atwood Ridge and Burke Branch. Currently, Forest Service personnel are ticketing violators of this closure order, including members of the Shawnee Trail Conservancy. On September 14, 1999, Forest Supervisor Slover closed to equestrian and vehicular traffic all the roads and trails within all 81 RNAs.

REASONS FOR GRANTING THE WRIT

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS REGARDING THE QUIET TITLE ACT.

A. The Seventh Circuit's Decision Is In Conflict With Decisions Of This Court.

Shawnee Trail Conservancy's suit is a constitutional challenge to the authority of the United States to regulate property that it does not own. Shawnee Trail Conservancy's suit does not and cannot seek to quiet title to the property because Shawnee Trail Conservancy claims no interest in the property for itself.

Congress specifically provided that a QTA lawsuit is one brought for the purpose of "adjudicat[ing] a disputed title." 28 U.S.C. § 2409a(a). However, Shawnee Trail Conservancy did not bring this action for the purpose of "adjudicat[ing] a disputed title," but rather and solely to challenge the authority of the United States to regulate property that it does not own. Therefore, this action is not a case to which the QTA was intended to apply.

This Court held in *Block v. North Dakota*, "Congress intended the QTA to provide the exclusive means by which *adverse claimants* could challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (emphasis added). This Court held that North Dakota and the United States were "adverse claimants" because the action involved competing claims between the United States and North Dakota.

Similarly, in *United States v. Mottaz*, 476 U.S. 834, 841-42 (1986), a private citizen sought a declaration that she possessed valid title to the property allotments at issue. This Court held that Mottaz was an "adverse claimant[]" because the action concerned competing claims between Mottaz and the United States.

Shawnee Trail Conservancy is not an "adverse claimant[]" that seeks "to adjudicate a disputed title," but rather is a third-party user of nonfederal public lands that seeks a ruling that, because the United States does not own the lands in question, it may not regulate those lands. Because Shawnee Trail Conservancy does not claim title to the lands in question, it is not and cannot be an "adverse claimant[]" seeking "to adjudicate a disputed

title." Therefore, this action may not be brought under the QTA.[1]

The Seventh Circuit's decision that Shawnee Trail Conservancy must bring its challenge to the authority of the United States to regulate property it does not own under the QTA is in true, direct, intolerable, and irreconcilable conflict with decisions of this Court. This Court must grant the petition to resolve this conflict.

B. The Seventh Circuit's Decision Is In Conflict With Decisions Of An Overwhelming Majority Of Federal Courts.

1. The majority of federal courts have applied the QTA only to "adverse claimants" seeking to quiet title in themselves.

In *Rosette, Inc. v. United States*, 141 F.3d 1394, 1395 (10th Cir. 1998), the Tenth Circuit held that the QTA applied because Rosette and the United States claimed ownership of geothermal steam resources on Rosette's land; in other words, they were "adverse claimants."[2]

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[1] In fact, Shawnee Trail Conservancy lacks standing to bring a QTA action for this very reason. *See* App. 21. The QTA provides, "The complaint shall set forth *with particularity* the nature of the right, title, or interest *which the plaintiff claims* in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(c) (emphasis added). Clearly, the QTA does not apply to Shawnee Trail Conservancy.

[2] In *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1211 n. 3 (10th Cir. 1999), the Tenth Circuit noted that "[t]he district court erred in characterizing plaintiffs' complaint as one seeking to quiet title in land owned by the United States" because "plaintiffs do not seek title to the real property that

In *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 2-4 (D.D.C. 1995), *aff'd*, 102 F.3d 1272 (D.C. Cir. 1996), Otero County, New Mexico, claimed that it, not the United States, had sole legal authority to levy grazing fees upon all unappropriated public lands in the county. The district court held, and the U.S. Court of Appeals for the District of Columbia agreed, that in order to find in favor of Otero County, the court had to conclude that the county, not the United States, held title to the disputed land. *Id.* Therefore, held the district court, Otero County was an "adverse claimant[]" under the QTA. *Id.*

In *McClellan v. Kimball*, 623 F.2d 83, 85 (9th Cir. 1980), private landowners filed a quiet title action in federal court, alleging that the Forest Service deprived them of the exclusive use and control of a 100-foot strip of land. The district court held that plaintiffs' exclusive remedy was under the QTA because the landowners and the United States were "adverse claimants." *Id. See also, Nevada v. United States*, 731 F.2d 633 (9th Cir. 1984) (Nevada brought suit against the United States to quiet title to a lake bed in itself); *Humboldt County v. United States*, 684 F.2d 1276, 1278-80 (9th Cir. 1982) (Humboldt County and United States were "adverse claimants" to two county roads across federal lands); *Park County v. United States*, 626 F.2d 718, 720 (9th Cir. 1980) (Park County and Sweet Grass County, Montana, and the United States were "adverse claimants" to right-of-way across national forest lands).

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comprises the Diamond Bar and Laney allotments." Consistent with the holdings of this Court, both *Diamond Bar Cattle Co.* and *Rosette* turned on whether the plaintiffs were "adverse claimants."

Similarly, in *Town of Beverly Shores v. Lujan*, 736 F. Supp. 934, 943-44 (N.D. Ind. 1989), the Town of Beverly Shores and the United States were "adverse claimants" because the Town disputed the federal government's fee-ownership interest in property in which the Town asserted that it had an interest. *See also, Washington County v. United States*, 903 F. Supp. 40, 42 (D. Utah 1995) (Washington County and United States were "adverse claimants" to highway rights-of-way).

The Seventh Circuit clearly misapprehended the holdings of these cases because it relied upon *Rosette, Nevada, Hat Ranch*, and *Beverly Shores* for its holding that "the majority of courts that have considered the QTA in the context of claims that do not seek to quiet title in the party bringing the action have nonetheless found the Act applicable, and we find the reasoning of these cases persuasive."[3] *Shawnee Trail Conservancy*, 222 F.3d at 388, App. 8-9.

2. The majority of federal courts have not applied the QTA to litigants challenging the authority of the federal government to regulate property it does not own.

Federal courts continue to exercise jurisdiction over challenges to the constitutional authority of the United States to regulate property that it does not own without reference to the QTA. *E.g., Free Enterprise Canoe Renters*

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[3] As noted above, each of the plaintiffs in *Rosette, Nevada, Hat Ranch*, and *Beverly Shores* sought to quiet title in themselves. The Seventh Circuit cited to no case, other than those discussed below, in which the QTA was held applicable to "claims that do not seek to quiet title in [themselves]."

Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983); and *Wilkenson v. Department of the Interior*, 634 F.Supp. 1265 (D. Colo. 1986).

In *Free Enterprise Canoe*, 711 F.2d at 855-56, an association brought an action challenging the authority of the National Park Service ("NPS") to regulate business activities on property that the United States does not own, *i.e.*, state and county roads and rights-of-way. The Eighth Circuit upheld the jurisdiction of the district court to rule on the merits without reference to the QTA. *Id.* at 856.

In *Wilkenson*, a resident of the county in which the Colorado National Monument is situated brought a lawsuit challenging the authority of the NPS to regulate a roadway, within the boundaries of the Monument, that the resident claimed was a public right of way.[4] The district court, without reference to the QTA, held that the NPS exceeded its authority. *Wilkenson*, 634 F.Supp. at 1275-76. Like Shawnee Trail Conservancy, all Wilkenson claimed was that the United States did not own the road and could not regulate it.

The Seventh Circuit's decision that Shawnee Trail Conservancy must bring its challenge to the authority of the United States to regulate property that it does not own under the QTA is in true, direct, intolerable, and irreconcilable conflict with decisions of other federal courts. This Court must grant the petition to resolve this conflict.

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[4] This case represents the mere tip of the iceberg as to the types of challenges that will be unavailable to citizens located within the 1,553,917 acres of new national monuments declared by the Executive. *See* p. 24, infra.

C. At One Time One Circuit Had, And Now Two Circuits Have, Held The QTA Applicable Where The Claimant Is Not An "Adverse Claimant."

The Ninth Circuit created a split among the Circuit Courts of Appeals regarding applicability of the QTA, a split now greatly expanded by the decision of the Seventh Circuit. In *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139, 143 (9th Cir. 1987), the Ninth Circuit held that the QTA applied because "[a]lthough [the Water District] may not be seeking to quiet title to the land in itself, it seeks a determination of the boundaries of the Reservation. The effect of a successful challenge would be to quiet title in others than the Tribe."

Again, in *State of Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994), the Ninth Circuit noted that "*Metropolitan Water District* expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims."

By expanding the applicability of the QTA to include plaintiffs who are not "adverse claimants," the Ninth Circuit's holdings in *Metropolitan Water District* and *State of Alaska* create a true, direct, intolerable, and irreconcilable conflict with holdings of this Court and other Circuit Courts of Appeals.

With its decision in this case, the Seventh Circuit has now joined the Ninth Circuit in holding the QTA applicable even when the claimant is not an "adverse claimant[]" seeking to "adjudicate a disputed title" and quiet title to

that property in itself. In fact, the Seventh Circuit went far beyond the holdings of the Ninth Circuit, holding that the QTA applies "any time a party seeks a title determination regarding real property in which the United States asserts an interest." *Shawnee Trail Conservancy*, 222 F.3d at 387, App. 7.

Because the holdings of the Ninth Circuit and now the Seventh Circuit create a true, direct, intolerable, and irreconcilable conflict with the decisions of this Court, and with the overwhelming majority of the Courts of Appeals, and because this split is growing, this Court must grant the petition to resolve this conflict.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN DECISIONS OF THE SEVENTH CIRCUIT AND DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS REGARDING APPLICATION OF THE FUTILITY DOCTRINE WHEN EXHAUSTION IS REQUIRED BY FEDERAL STATUTE.

A. This Court Has Applied The Futility Exception In Cases Of Statutorily Mandated Exhaustion.

Although this Court specifically addressed, in *Darby v. Cisneros*, 509 U.S. 137, 138 (1993), "the relationship between the judicially created doctrine of exhaustion of administrative remedies and the statutory requirements of Section 10(c) of the APA," the Court did not address whether exceptions to the exhaustion doctrine, such as futility, remain available to an adversely affected party bringing an action under the APA.

However, because "Congress effectively codified the doctrine of exhaustion of administrative remedies in § 10(c) [of the APA]," *id.*, it stands to reason that codification of the judicially created doctrine would include codification of the judicially created "exceptions" to that doctrine as well. *See* William F. Funk, *Exhaustion of Administrative Remedies – New Dimensions Since Darby*, Rocky Mountain Mineral Law Foundation, Natural Resources and Environmental Administrative Law & Procedure, Mineral Law Series, Vol. 1999, No. 4, Paper 5 (soon to be published in Pace Environmental Law Review, Vol. 18, No. 1). ("Inasmuch as the text of section [10(c)] does not contain any of the many exceptions to exhaustion that existed in the common law . . . the Court's statement that the section codifies the doctrine can only be true if those exceptions are impliedly contained in the section.").

Furthermore, this Court in *Darby* interpreted Section 10(c) as a provision designed to "remove obstacles to judicial review of agency action," holding only that federal courts may not require a plaintiff to exhaust administrative remedies before seeking judicial review under the APA when exhaustion is required neither by statute nor agency rule. *Darby*, 509 U.S. at 147, 154. Thus, nothing in *Darby* prevents application of the common law exceptions to the exhaustion doctrine. In fact, the opposite conclusion is more likely: codification of the exhaustion doctrine in Section 10(c) includes the exceptions, given that Section 10(c) was designed to promote, not limit, judicial review of agency action.

In several cases, this Court has addressed the exhaustion requirement of the Social Security Act ("SSA"), 42 U.S.C. § 405(g), which provides for judicial review of a

"final decision" by the Secretary. In *Heckler v. Lopez*, 463 U.S. 1328, 1332 (1983), this Court held that the exhaustion requirement of the Social Security Act "codif[ies] the doctrine of exhaustion of administrative remedies." Subsequently, in *Heckler v. Ringer*, 466 U.S. 602, 618 (1984), this Court recognized the applicability, in certain cases, of the common law exceptions to the exhaustion doctrine, whether required by statute or agency regulations, citing to *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976). Similarly, in *Bowen v. City of New York*, 476 U.S. 467, 482-84 (1986), this Court held that, when the "purposes of exhaustion would not be served by requiring [exhaustion]," exhaustion is not required and should be waived. *Id.* at 484; *see also*, *Honig v. Doe*, 484 U.S. 305, 326-27 (1988), and *Smith v. Robinson*, 468 U.S. 992, 1014 n. 17 (1984).

The decision of the Seventh Circuit that the common law futility exception to the exhaustion doctrine does not apply when exhaustion is mandated by federal statute creates a true, direct, intolerable, and irreconcilable conflict with the decisions of this Court. This Court must grant the petition to resolve this conflict.

B. The Seventh Circuit Has Created A New Split Between The Circuits On Whether The Futility Exception Applies To The APA.

Two Circuits have applied the futility exception when administrative exhaustion is required by Section 10(c) of the APA. In *Clouser v. Espy*, 42 F.3d 1522, 1531-32 (9th Cir. 1994), plaintiffs failed to exhaust administrative

remedies as required by Forest Service regulations promulgated under Section 10(c) of the APA. *Id.* at 1531-32. The Ninth Circuit recognized, as a matter of law, that the futility exception was available even when exhaustion is required by the APA. *Id.* at 1533. In *Volvo GM Heavy Truck Corp. v. United States Dept. of Labor*, 118 F.3d 205, 213 (4th Cir. 1997), the Fourth Circuit recognized that the futility exception is available even when exhaustion is required by the APA.[5]

The Seventh Circuit is the only Circuit that has refused to apply the futility exception when administrative exhaustion is required by Section 10(c) of the APA. In *Glisson v. United States Forest Service*, 55 F.3d 1325, 1328 (7th Cir. 1995), which the Seventh Circuit followed in this case, plaintiff had failed to exhaust administrative remedies as required by Forest Service regulations, promulgated under Section 10(c) of the APA. Citing *Darby*, and expressing surprise that the decision was "not discovered by either party to our case,"[6] the Seventh Circuit held that Section 10(c) is "exclusive" and that "section 10(c) required exhaustion, and Glisson failed to exhaust." *Id.* at 1327-28.

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[5] Another Circuit has questioned, without deciding, the applicability of the judicially recognized exceptions when exhaustion is required by Section 10(c) of the APA: "One may wonder whether judicially-recognized exceptions to a judicially-created exhaustion requirement are still pertinent after *Darby*." *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409, 411 (D.C. Cir. 1998).

[6] It is much more likely that the parties in *Glisson* did not find *Darby* applicable.

Because the Seventh Circuit's decision is in conflict, not only with decisions of this Court regarding application of the futility exception when exhaustion is required by federal statute, but also with the decisions of other Circuit Courts of Appeals, this Court must grant the petition to resolve this conflict.[7]

III. A TRUE, DIRECT, INTOLERABLE AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND DECISIONS OF THIS COURT AND OTHER CIRCUITS REGARDING WHAT CONSTITUTES A "FUTILE" APPEAL.

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of This Court.

The Seventh Circuit held that, in order for the futility exception to apply to Shawnee Trail Conservancy's case,

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[7] The Circuits are split as to whether the futility exception applies when exhaustion is required by other federal statutes. Circuits holding that the futility exception applies even when exhaustion is mandated by statute include *Pavano v. Shalala*, 95 F.3d 147 (2nd Cir. 1996); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*, 20 F.3d 1418 (6th Cir. 1994); and *Equal Opportunity Employment Comm'n v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999). Circuits holding that the futility exception does not apply include *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90 (2nd Cir. 1998); *Federal Deposit Ins. Corp. v. Scott*, 125 F.3d 254 (5th Cir. 1997); and *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190 (9th Cir. 1990) (improperly relying on this Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975)). The Third Circuit has questioned, without deciding, the issue. *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3rd Cir. 1991).

the Forest Service must be rendered "powerless to grant the plaintiffs' request." *Shawnee Trail Conservancy*, 222 F.3d at 390, App. 13. The Seventh Circuit held that although "the Forest Service's 1988 settlement agreement presents an obstacle to the administrative actions requested by the plaintiffs," it did not render the Forest Service "powerless" to grant the requested relief and, therefore, the futility exception did not apply. *Id.*

In *McCarthy v. Madigan*, 503 U.S. 140, 146-148 (1992), this Court recognized three general exceptions to the administrative exhaustion doctrine: 1) when "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action;" 2) when there is "some doubt as to whether the agency was empowered to grant effective relief;" and 3) "where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *See also, Houghton v. Shafer*, 392 U.S. 639, 640 (1968).

Therefore, the Seventh Circuit's decision requiring that the Forest Service be "powerless" to grant Shawnee Trail Conservancy's requested relief in order for the futility exception to exhaustion to apply is in conflict with this Court's holdings in *McCarthy* and *Houghton*, which recognize the futility exception, both when there is "some doubt" as to the "[]power[]" of the agency to grant the relief sought and when the agency is "biased" or has "predetermined the issue." Contrary to the holding of the Seventh Circuit, Shawnee Trail Conservancy need not show that the agency is "powerless" to act, only that there is "some doubt" as to the agency's power to act. Certainly the Settlement Agreement raised "some doubt"

as to the "[]power[]" of the agency to "grant effective relief" by abandoning that agreement. However, the Seventh Circuit, in conflict with *McCarthy*, rejected this Court's holding that "some doubt" is enough to meet the futility exception.[8]

Furthermore, the "obstacle" to which the Seventh Circuit refers is the fact that the Forest Service is "biased" or has "predetermined the issue" by entering into the Settlement Agreement. But, in the view of the Seventh Circuit, because that "bias[]" or "predetermin[ation]" did not render the Forest Service "powerless," the futility exception did not apply. By its decision, the Seventh Circuit combines the second and third exceptions of *McCarthy*, greatly weakening the second while obliterating the third. Under the Seventh Circuit's holding, so long as the agency has the "[]power[]" to act, "some doubt" as to that "[]power[]" or "undue prejudice" to a party, or "bias[]" or "predetermin[ation]" on the part of the agency fails to meet the requirements of the futility exception.

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[8] "In order to come under the futility exception, the plaintiffs must show that *it is certain* that their claim will be denied on appeal, *not merely that they doubt* an appeal will result in a different decision." *Shawnee Trail Conservancy*, 222 F.3d at 389 (emphasis added) (App. 12). Ignoring the bias and predetermination aspects of the futility doctrine, the Seventh Circuit held that "[i]t is possible that . . . the Forest Service would have altered its decision . . . " *Id.* at 389-90 (App 13). Because it is only "possible" that the Forest Service would have abandoned the Settlement Agreement, there is "some doubt" as to whether it would have done so. Therefore, *McCarthy*'s second futility exception is met.

Because the Seventh Circuit's decision is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court, this Court must grant the petition to resolve this conflict.

B. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of Other Circuits.

The Federal Circuit, in *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000), has held, citing *McCarthy*, that exhaustion is not required when an administrative remedy can be deemed inadequate because the administrative agency is "shown to be biased or has otherwise predetermined the issue before it."

The First Circuit, in *Swirsky v. National Ass'n of Securities Dealers*, 124 F.3d 59, 63 (1st Cir. 1997), recognized that where there is "clear indicia of agency bias or taint," exhaustion may be excused. *See also, Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 77 (1st Cir. 1997) (where "the potential decisionmaker is biased or can be shown to have predetermined the issue, failure to exploit an available administrative remedy may be forgiven"); *Rice v. United States Dept. of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 708 (3rd Cir. 1995) ("exhaustion may not be required when the agency is shown to be biased or has otherwise predetermined the issue before it") (internal quotations omitted).

In *Lopez v. Heckler*, 725 F.2d 1489, 1500-01 (9th Cir. 1984), the Ninth Circuit held that where the Secretary of Health and Human Services had preordained the outcome of administrative hearings required by exhaustion, exhaustion was futile. *See also, Carr v. Pacific Maritime*

Ass'n, 904 F.2d 1313, 1321-22 (9th Cir. 1990) ("bias" and "lack of neutrality" in adjudicating body render exhaustion of administrative procedures futile).

Finally, the Tenth Circuit has held that where a plaintiff has shown the mere "improbability" of obtaining adequate relief through exhaustion of administrative appeals, the futility exception applies. *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 850 (10th Cir. 1982).

Because the decision of the Seventh Circuit is in conflict with decisions of this Court and those of other Circuit Courts of Appeals regarding the futility doctrine, this Court must grant the petition to resolve this conflict.

IV. THIS CASE INVOLVES TWO MATTERS OF EXCEPTIONAL NATIONAL IMPORTANCE.

A. Private Parties Must Not Be Denied The Right To Challenge The Unconstitutional Assertion Of Federal Control Over Nonfederal Land.

The Property Clause of the Consitution provides that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, sec. 3, cl. 2. In various federal statutes, Congress has delegated regulatory power to federal land management agencies, such as the Forest Service. *See* Forest Service Organic Act, 16 U.S.C. §§ 475, *et seq.*; Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, *et seq.* Thus, the question of whether lands over which federal agencies assert such regulatory authority

are "Territor[ies] or other Property belonging to the United States" is of first importance because, if the United States does not own the land, then the United States has no authority to regulate it. As a result, a party affected adversely by an attempt by a federal land management agency to regulate property that it does not own may assert that the agency lacks such regulatory power because the land is not a "Territory or other Property belonging to the United States."

However, as a result of the decision of the Seventh Circuit in this case, such a private party may challenge an assertion of federal land management authority over property that is not owned by the United States only by means of the QTA. However, the QTA, by its express terms and by rulings of this Court, is limited to "adverse claimants" who seek "to adjudicate disputed title to real property." Therefore, some third party, although adversely affected by the asserted regulatory authority of the federal land management agency over land that it does not own, may not challenge that assertion of authority over nonfederal land. The implications of such a bar are far reaching.

Today, one-third of the Nation is owned by the United States, primarily in the western United States, but also in concentrated areas in the rest of the Nation, such as, in this case, the southern tip of Illinois.[9] In many

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[9] Other examples of concentrated pockets of federal ownership in the east include the northwestern corner of Pennsylvania, western North Carolina, southeastern Missouri, northwestern Arkansas, eastern West Virginia, northeastern Minnesota, and the southern tip of Florida.

western States, the federal government is the majority landowner. For example, the federal government owns 62 percent of the land in Idaho, 80 percent of Nevada, 52 percent of Oregon, and 64 percent of Utah. Bureau of Land Management, *Public Land Statistics 1998*, pp. 10-11. Moreover, in rural counties in some areas of the country, the federal government owns sixty, seventy, eighty, and even ninety percent of the land within the county. These lands, especially in the East, but also in some rural western counties, are interspersed amongst private land holdings.[10] As a result, federal land management agencies, such as the Forest Service in this case, often assert authority over land that they do not own.[11]

Because of the nature of federal land ownership in such areas, this assertion of regulatory authority over land not owned by the United States adversely affects individuals and entities that do not own the property and that wish to challenge the authority of the federal government to regulate that property. Under the decision of the Seventh Circuit, those individuals and entities may not challenge the regulatory authority of the federal land

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[10] This is particularly the case in southern Illinois due to the simple fact that the entire area was homesteaded and then reacquired by the United States on a homestead by homestead basis. Therefore, the land that constitutes the Shawnee National Forest is intermingled with privately owned land.

[11] This assertion of authority over nonfederal land is an increasing phenomenon. *See, e.g., Stupak-Thrall v. United States*, 843 F. Supp. 327 (W.D. Mich. 1994), *aff'd*, 89 F.3d 1269 (6th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); and *United States v. Brown*, 186 F.3d 1055 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1418 (2000).

management agency over land it does not own. That bar will affect directly millions of Americans who live, work, and recreate throughout those portions of the United States, particularly in the West and in certain regions of the East in which federal lands predominate.

Moreover, to an increasing degree, for the past four years, through a variety of executive orders and decrees, the Executive has restricted the activities that may take place on millions of acres of federal land.[12] Scattered throughout the vast tracts of lands over which these new land management regimes have been asserted are private holdings that will be affected adversely by these orders and decrees. These private holdings, totaling hundreds of thousands of acres, will be regulated as if they were "Territor[ies] or other Property belonging to the United States," although they are not. However, under the decision of the Seventh Circuit those adversely affected by such unconstitutional assertions of regulatory authority will be unable to challenge that authority because they must bring, but may not bring, their challenge under the QTA. Because of the far-reaching nature and exceptional national importance of the Seventh Circuit's decision, the petition must be granted.

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[12] *See* 65 Fed. Reg. 2825 (affecting 1,014,000 acres); 65 Fed. Reg. 37243-37262 (affecting 539,917 acres total); 64 Fed. Reg. 56306 (affecting 40-60 million acres). These notices regard proclamations of new national monuments by the Executive pursuant to the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, as well as notice of a national initiative regarding 40 million acres of Forest Service "roadless areas."

B. Private Parties Must Not Be Required To Engage In Appeals Of Adverse Federal Agency Action Rendered Futile As A Result Of Federal Agency Bias Or Predetermination.

The Forest Service regulates activities on 192 million acres throughout the United States, lands managed primarily, although not exclusively, in accordance with the multiple-use mandates of federal law. As a result, millions of Americans make use of these lands for a variety of economic and recreational activities. Those Americans, such as the thousands of men and women represented by the Shawnee Trail Conservancy, participate in the rulemaking activities by which the Forest Service manages and regulates these millions of acres of federal land. An aspect of that participation is the ability of users of national forest lands to appeal any adverse decision to Forest Service officials. Finally, as a matter of last resort, users of national forest lands may challenge the land management actions of the Forest Service in federal court pursuant to the APA.

However, as with any other federal litigation, settlement discussions and subsequent agreements regarding such legal challenges to Forest Service land management decisions not only occur, they are encouraged.[13] In fact, a substantial number of such challenges are resolved in just such a manner; that is, by the parties entering into the very type of settlement agreement that occurred in this case, pursuant to which the Forest Service agrees to alter

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[13] *See* Fed. R. Civ. P. 16(c); United States District Court for the Southern District of Illinois, Local Rule 11(d) ("a settlement conference *shall* be held") (emphasis added).

the manner in which it manages the federal lands in question. These agreements are advantageous, not simply because they conserve scarce judicial resources, but also because they conserve the scarce resources of federal land management agencies and their employees by permitting them to turn their attention to the management of the federal lands under their jurisdiction.

That being the case, it makes absolutely no sense to require, as the Seventh Circuit decision now requires, that those parties, such as the Shawnee Trail Conservancy here, adversely affected by the implementation of a settlement agreement, engage in an administrative appeal of the land management action in a "futile" hope that the federal agency will abandon the settlement agreement on the very basis of which the agency took the newly disputed action. Not only would such an appeal waste the scarce human resources of the federal land management agencies by requiring them to process an administrative appeal that is doomed because of the binding settlement agreement, the futility of that appeal would cause the public to become cynical and hostile regarding the administrative appeals process.

These problems are particularly troubling where, as here, the very official to whom Shawnee Trail Conservancy was required to appeal, that is, the Regional Forester, is the individual who signed the Settlement Agreement. Moreover, the cynicism of the public will increase dramatically if the requirement for such "futile" appeals is based on the arguments offered by the United States below that "[t]he Settlement Agreement [] bound

the Forest Service only to the extent that the Forest Service wished to be bound by it." Seventh Circuit Brief for Federal Appellees, at 35.

With confidence in the ability of government to meet the needs of the public, as well as in the fairness and justice of the legal system, at historic lows and cynicism regarding these matters at historic highs, the federal land-using public does not need one more reason to conclude that the government does not expedite, but instead exacerbates, its ability to be heard promptly and fairly and that the legal system does not fulfill, but instead frustrates, its access to the courts of the land.

The exceptional importance of such concerns becomes national in scope upon consideration of the fact that the Forest Service manages its 192 million acres in nearly all fifty states. If the Forest Service is successful in imposing this new rule for exhaustion, not just in the three states of the Seventh Circuit, but throughout the country, millions of Americans will be compelled to conclude cynically that the Forest Service and the federal courts have erected senseless and unreasonable barriers to their ability to participate in the decision-making process by which federal lands are managed. Because of the far-reaching and exceptional national importance of the Seventh Circuit's decision, this petition must be granted.

CONCLUSION

For all of the above reasons, this Court must grant this petition.

Respectfully submitted,

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Dated: October 23, 2000

In the

United States Court of Appeals,
For the Seventh Circuit

No. 99-3364

Shawnee Trail Conservancy, Illinois Trail Riders, Horsemen's Council of Illinois, Southern Illinois Campground and Ranch Owners Association, and Illinois Federation of Outdoor Resources,

Plaintiffs-Appellants,

v.

United States Department of Agriculture, United States Forest Service, Daniel Glickman, Secretary of Agriculture, Michael P. Dombeck, Chief, United States Forest Service, Robert T. Jacobs, Regional Forester, Eastern Region (R-IX), United States Forest Service, and Louise Odegaard, Supervisor, Shawnee National Forest,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 98-CV-4248-JPG–J. Phil Gilbert, Chief Judge.

Argued March 29, 2000 – Decided July 25, 2000

Before Flaum, Ripple, and Kanne, Circuit Judges.

Flaum, Circuit Judge. The Shawnee Trail Conservancy, the Illinois Trail Riders, the Horsemen's Council of Illinois, the Southern Illinois Campground and Ranch Owners Association, and the Illinois Federation of Outdoor Resources brought suit in federal district court under both the United States Constitution and the

Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., alleging that the defendants lacked the constitutional and statutory authority to designate certain areas of the Shawnee National Forest (the "Shawnee") as Research Natural Areas ("RNAs"). The district court dismissed both of the plaintiffs' claims for lack of subject matter jurisdiction, finding that the plaintiffs' constitutional claim was an adverse claim of title against the United States and therefore had to be brought pursuant to the Quiet Title Act of 1972 ("QTA" or the "Act"), 28 U.S.C. § 2409a et seq., and that the plaintiffs failed to exhaust their administrative remedies for purposes of their APA claim. For the reasons stated herein, we affirm the decision of the district court.

I. Facts

The dispute in this case centers on the use of the Shawnee National Forest, an area that consists of approximately 265,135 acres in southern Illinois. The Shawnee is managed by the United States Forest Service according to a land use and management plan required by statute. According to the applicable regulations, the goal of the land use and management plan is to "maximize [ ] long term net public benefits in an environmentally sound manner."

In November 1986, the Forest Service issued its 1986 Land and Resource Management Plan. Among other things, the Plan proposed that twelve areas in the Shawnee, including the Atwood Ridge area and the Burke Branch area, be designated RNAs. RNAs are areas of land within a National Forest on which the Forest Service

allows natural conditions to prevail in order to promote biological diversity, research and monitoring, and education. The Chief of the Forest Service followed the recommendations of the 1986 Plan and established the Atwood Ridge RNA in September 1990 and the Burke Branch RNA in March 1991.

The Forest Service has designated a total of eighty-one areas in the Shawnee as RNAs. In order to protect these areas, mountain bikes, all-terrain vehicles, and off-road motorcycles are prohibited. In addition, equestrian use is limited to designated trails. On January 31, 1997, the Forest Service took the additional step of closing forty of the Shawnee's RNAs, including the Atwood Ridge RNA and the Burke Branch RNA, to all equestrian use.

In July 1998, the plaintiffs filed suit in federal district court challenging the Forest Service's decision to restrict access to the Atwood Ridge and Burke Branch areas and its decision to designate those areas as RNAs. The district court dismissed the plaintiffs' constitutional claim on the ground that it challenged the United States' title to land and consequently had to be brought under the QTA. The district court also dismissed the plaintiffs' APA claim, holding that they failed to exhaust their administrative remedies. This appeal followed.

II. Analysis

We review de novo the district court's grant of the defendants' motion to dismiss for lack of subject matter jurisdiction. *See Sapperstein v. Hager*, 188 F.3d 852, 855 (7th

Cir. 1999). In considering the defendants' motion to dismiss, we "must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff[s]." *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

A. The Quiet Title Act

The plaintiffs' complaint alleged that the Forest Service lacks the authority to restrict the use of certain roads in the Atwood Ridge RNA and the Burke Branch RNA. According to the plaintiffs, these roads are subject to both public and private easements and rights-of-way that predate the creation of the Shawnee. The plaintiffs contend that because these easements and rights-of-way have been continually used and have not been vacated or abandoned, the right to control the use of the roads in the Atwood Ridge RNA and the Burke Branch RNA are not held by the Forest Service. In other words, the plaintiffs contend that the Forest Service cannot restrict the use of the roads in the Atwood Ridge and Burke Branch areas because they do not own the property rights necessary to make decisions concerning their incidents of use.

The district court did not reach the plaintiffs' constitutional claim on the merits, but rather concluded that it did not have subject matter jurisdiction over this claim because the plaintiffs' argument represented a clear challenge to the United States' ownership of the land in question. According to the district court, all such challenges must be brought pursuant to the QTA. Because the plaintiffs did not bring their claim under the QTA, but rather under the Constitution, the district court held that

it could not consider the issue of title to the land. The district court further found unpersuasive the plaintiffs' attempt to structure their claim as a constitutional challenge to the federal government's regulatory authority, and not to its title. On appeal, the plaintiffs contend that this decision was erroneous and that the district court properly had subject matter jurisdiction over their constitutional challenge to the restrictions imposed by the Forest Service.

The QTA operates as a limited waiver of sovereign immunity in cases where a party seeks to adjudicate a title dispute to real property in which the United States claims an interest. Specifically, the Act provides that: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). In its decisions interpreting the QTA, the Supreme Court has made clear that, through its adoption of the Act, "Congress intended . . . to provide the exclusive means by which *adverse claimants* could challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (emphasis added). While the plaintiffs concede that the QTA is the exclusive vehicle for suits challenging the United States' title to real property in certain contexts, they contend that this exclusivity principle does not apply when the party bringing the suit is not an adverse claimant.

The plaintiffs contend that the "adverse claimants" language in the Supreme Court's *Block* opinion is an important limitation on the exclusivity of the QTA. The plaintiffs admit that the Act is the exclusive means by

which a party claiming a property interest in land in which the United States also maintains an interest may challenge the United States' assertion of title. However, the plaintiffs argue that the QTA does not limit their ability to challenge the United States' regulatory authority by bringing suit pursuant to other statutes or the Constitution as long as they do not seek to quiet title in themselves. Under this theory, because the plaintiffs do not claim that they own the easements or rights-of-way over the roads in the Atwood Ridge RNA and the Burke Branch RNA, the plaintiffs' suit need not be brought pursuant to the QTA.

In support of this argument, the plaintiffs do not cite any case law specifically limiting the exclusivity of the QTA to suits in which the plaintiffs seek to quiet title in themselves. Instead, they rely on cases that have entertained challenges to the regulatory authority of the United States without addressing the QTA. *See*, e.g., *Wilkenson v. Department of the Int.*, 634 F.Supp. 1265 (D. Colo. 1986); *Stupak-Thrall v. Glickman*, 988 F.Supp. 1055 (W.D. Mich. 1997). Although we recognize that these cases resolved title disputes similar to the one around which this case centers without reference to the QTA, it is significant that those cases give no indication that the QTA was ever raised as an issue. In circumstances where a court assumes jurisdiction without addressing a jurisdictional issue, that assumption of jurisdiction is of limited precedential value. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silento*.").

Because we find the precedent cited by the plaintiffs to be of little value, the merits of their argument turn on the persuasiveness of their definition of "adverse claimants." According to the plaintiffs, the plain meaning of "adverse claimants" does not include parties who, although challenging the federal government's right to regulate land, do not attempt to quiet title in themselves. Although we agree that the interpretation offered by the plaintiffs is a plausible one, we do not believe that the language of the Supreme Court's opinion in *Block* is as clear as the plaintiffs contend. It is true that the plaintiffs do not assert that they own the land, and in that sense they are not making a claim to title on behalf of themselves that is adverse to the government's asserted interest. However, the plaintiffs do claim that certain third parties own the land, and not the government, and this in itself represents an assertion of title that runs adverse to the government. In these circumstances, the plain meaning of the phrase "adverse claimants" does not adequately answer the question before us.

In considering this very issue, the Ninth Circuit rejected the argument made by the plaintiffs and held that the QTA applies any time a party seeks a title determination regarding real property in which the United States asserts an interest. *See Metropolitan Water Dist. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987) (per curiam), aff'd sub nom. *California v. United States*, 490 U.S. 920 (1989). In that case, the Metropolitan Water District sought to prevent an Indian tribe from gaining additional water rights as the result of an expansion in the tribe's reservation boundaries. *See id.* at 141. Although recognizing that the water district was "not seeking to quiet title

in itself," the court held that the QTA applied because the water district "s[ought] a determination of the boundaries of the Reservation" and "[t]he effect of a successful challenge would be to quiet title in others than the Tribe." *Id.* at 143. In a later opinion, the Ninth Circuit noted that "*Metropolitan Water District* expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994).

Although no other court has considered the issue presented to us in as direct a fashion as the Ninth Circuit, several courts have indicated that the Ninth Circuit's broad reading of the exclusivity of the QTA is correct. In a suit for money damages based on an allegedly invalid government sale of land, the Supreme Court rejected the plaintiff's attempts to avoid the QTA on the ground that resolution of the case entailed determining who held valid title to the land in question. *See United States v. Mottaz*, 476 U.S. 834, 841-43 (1986) (noting that "the claim for title is the essence and bottom line of respondent's case"). Similarly, in cases where the QTA is raised as a jurisdictional issue, other federal courts consistently apply the QTA in circumstances where parties do not seek to quiet title in themselves. *See Rosette, Inc. v. United States*, 141 F.3d 1394, 1397 (10th Cir. 1998) (dismissing a declaratory judgment action brought outside the QTA because the plaintiff's claims were "all linked to the question of title"); *Nevada v. United States*, 731 F.2d 633, 636 (9th Cir. 1984) (applying the QTA to a Property Clause claim where, in order to succeed, the plaintiff

"would have to show that the United States lacked title" to the property in dispute); *Hat Ranch, Inc. v. Babbitt*, 932 F.Supp. 1, 3 (D.D.C. 1995), aff'd sub nom. *Hat Ranch, Inc. v. United States*, 102 F.3d 1272 (D.C. Cir. 1996) (refusing to consider declaratory judgment action where "[t]he authority to levy grazing fees depends upon ownership of the land" and where "[i]n order to decide who is entitled to assess and collect grazing fees, th[e] Court would be required to decide who owns the [disputed lands]"); *Town of Beverly Shores v. Lujan*, 736 F.Supp. 934, 944 (N.D. Ind. 1989) (dismissing an APA claim for lack of subject matter jurisdiction because "an action pursuant to the APA . . . is not the proper method for determining competing claims to real property to which the United States of America claims interest"). It thus appears that the majority of courts that have considered the QTA in the context of claims that do not seek to quiet title in the party bringing the action have nonetheless found the Act applicable, and we find the reasoning of these cases persuasive.

In adopting the QTA, Congress waived the United States' sovereign immunity to suits challenging the United States' title to land. *See Lombard v. United States*, 194 F.3d 305, 308 (1st Cir. 1999). However, this waiver of sovereign immunity is limited, most importantly by the Acts' twelve year statute of limitations on title claims, 28 U.S.C. § 2409a(g), and by the preservation of immunity in cases where the United States claims an interest in land as trust or restricted Indian land, 28 U.S.C. § 2409a(a). To allow claimants to avoid the QTA by characterizing their complaint as a challenge to the federal government's regulatory authority would be to allow parties to seek a

legal determination of disputed title without being subject to the limitations placed on such challenges. *See Rosette*, 141 F.3d at 1397 (stating that allowing a declaratory judgment action "would render the Quiet Title Act's statute of limitations meaningless"); *Nevada*, 731 F.2d at 636 (arguing that to allow a Property Clause challenge outside the QTA "would be to render [that Act's] statute of limitations meaningless"). " 'It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.' " *Block*, 461 U.S. at 285 (quoting *Brown v. GSA*, 425 U.S. 820, 833 (1976)). Because we believe that Congress intended for suits that require resolution of a disputed claim to real property in which the United States claims an interest to be brought under the QTA, we hold that the district court properly dismissed the plaintiffs' constitutional challenge for lack of subject matter jurisdiction.

B. The Administrative Procedure Act

The plaintiffs next contend that the Forest Service violated the APA in acting arbitrarily, capriciously, and not in accordance with the law when it designated the Atwood Ridge and Burke Branch areas of the Shawnee as RNAs. The district court dismissed this APA claim for lack of subject matter jurisdiction, finding that the plaintiffs failed to exhaust their administrative remedies before filing suit in federal district court. The plaintiffs appeal this holding, arguing that the district court erred when it refused to excuse the plaintiffs' failure to exhaust their administrative remedies because, according to the

plaintiffs, pursuing those administrative remedies would have been futile.

The requirement of administrative exhaustion is a traditional common law doctrine that has now been codified in section 10(c) of the APA, 5 U.S.C. § 704. Although section 10(c) only permits review of agency actions that are "final," any definitive agency decision is considered "final," and therefore reviewable, unless the agency's regulations require exhaustion as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 153 (1993). In this case, the relevant Forest Service regulation provides that "any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part." 36 C.F.R. § 217.18. Because the Forest Service regulations explicitly require exhaustion as a prerequisite to judicial review, and because the plaintiffs in this case did not pursue the available administrative appeals to the challenged RNA designations, the district court was correct in applying an administrative exhaustion requirement to the plaintiffs' APA claim. *See Glisson v. United States Forest Service*, 55 F.3d 1325, 1328 (7th Cir. 1995) (applying the administrative exhaustion requirement of the APA in circumstances where Forest Service regulations require such exhaustion).

The plaintiffs do not challenge the conclusion that an administrative exhaustion requirement could apply to their case, but rather contend that this requirement should have been waived because any administrative appeal would have been futile. *See*, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992) (discussing waiver of

the exhaustion requirement in circumstances where an appeal is futile); *Wilczynski v. Lumbermens Mutual Casualty Co.*, 93 F.3d 397, 402 (7th Cir. 1996) (recognizing the futility exception to administrative exhaustion). According to the plaintiffs, the United States Department of Agriculture and the Forest Service were bound by the terms of a 1988 settlement agreement with various environmental groups that precluded them from re-opening roads in the Burke Branch and Atwood Ridge areas. The plaintiffs argue that because the defendants are prohibited by a preexisting settlement agreement from changing the RNA designations that the plaintiffs now challenge, any appeal to the Forest Service seeking to alter those designations would have been futile.

Although we do not believe that the district court had the power to waive the statutorily-mandated exhaustion requirement of the APA, *see Glisson*, 55 F.3d at 1327 (contrasting the flexible common law doctrine of administrative exhaustion with the "inflexible command of a statute"), the plaintiffs have not demonstrated that the district court erred in applying administrative exhaustion even if we assume arguendo that the district court had the discretion to excuse that failure on the ground of futility. "In order to come under the futility exception, the [plaintiffs] must show that it is certain that their claim will be denied on appeal, not merely that they doubt an appeal will result in a different decision." *Smith v. Blue Cross & Blue Shield United of Wisc.*, 959 F.2d 655, 659 (7th Cir. 1992). Furthermore, "the decision to require exhaustion as a prerequisite to bringing suit is a matter within the discretion of the trial court and may be disturbed on

appeal only when there has been a clear abuse of discretion." *Powell v. AT & T Comm., Inc.*, 938 F.2d 823, 825 (7th Cir. 1991).

After a review of the record, we conclude that the district court did not abuse its discretion in requiring the plaintiffs to exhaust their administrative appeals. While it is true that the 1988 settlement agreement does not appear to allow the Forest Service to re-open roads in the Burke Branch and Atwood Ridge areas, the agreement does not give any party the right to compel the Forest Service's compliance with that obligation. It is possible that had the plaintiffs pursued the available avenues for administrative relief, the Forest Service would have altered its decision to designate the Burke Branch and Atwood Ridge areas as RNAs and would have re-opened the closed roads in those areas. The result of such an action would have been a possible breach of the 1988 settlement agreement and a consequent nullification of that agreement, but the plaintiffs would have received the relief that they sought. In this case the Forest Service's 1988 settlement agreement presents an obstacle to the administrative actions requested by the plaintiffs, but it does not render the defendants powerless to grant the plaintiffs' request. Under these circumstances, we cannot conclude that the district court erred in refusing to apply the futility exception to excuse the plaintiffs' failure to exhaust their administrative remedies.

III. Conclusion

The district court correctly dismissed the plaintiffs' QTA and APA claims for lack of subject matter jurisdiction. We accordingly AFFIRM the decision of the district court.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 25, 2000

BEFORE: Honorable JOEL M. FLAUM, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 99-3364

SHAWNEE TRAIL CONSERVANCY, ILLINOIS TRAIL RIDERS, HORSEMEN'S COUNCIL OF ILLINOIS, et al.,
Plaintiffs - Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES FOREST SERVICE, DANIEL GLICKMAN, Secretary of Agriculture, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. 98 C 4248, J. Phil Gilbert, Chief Judge

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SHAWNEE TRAIL CONSERVANCY, et al.,	)	
Plaintiffs,	)	**No. 98-CV-4248-JPG**
v.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,	)	
Defendants.	)	

ORDER
(Filed July 31, 1999)

GILBERT, Chief Judge:

Pending before the Court is the defendants' motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) (doc. 12). The plaintiffs have responded (doc. 14).

I Facts

The plaintiffs' complaint challenges the United States Forest Service's ("FS") authority to close certain roads within the Shawnee National Forest ("SNF"), as well as the FS's authority to designate certain areas of the Shawnee as Research Natural Areas ("RNA's"). Plaintiffs are several not-for-profit groups concerned with access to federal lands by recreationists (including horsemen, trail riders, mountain bikers, etc.)

This action was predicated upon SNF Supervisor Louise Odegaard's January 31, 1997, decision to close and

restrict conditions of use for forty (40) natural areas within the Shawnee including two RNA's that are the subject of this lawsuit – Burke Branch and Atwood Ridge. The complaint contains two separate claims for relief: (1) that the FS did not have the authority to prohibit equestrian use of 40 of the Shawnee's natural areas, including Burke Branch and Atwood Ridge, because of easements in effect; and (2) the designation of Atwood Ridge and Burke Branch as RNA's was unlawful and violated the Administrative Procedures Act, 5 U.S.C. §706, as the decision was arbitrary, capricious and an abuse of discretion.

II Motion to dismiss

The defendants moved to dismiss the action stating: (1) Count I regarding the roads' closure should be dismissed because the claim should properly be based, not upon the APA, but upon the Quiet Title Act, 28 U.S.C. §2409a; and (2) Count II regarding the RNA designations should be dismissed because the plaintiffs failed to exhaust their administrative remedies. The Court agrees with both contentions.

The plaintiffs oppose the motion to dismiss by stating: (1) their claim regarding the roads is not a challenge to the *title* of the property, but instead a challenge to the extent and nature of the government's administrative authority over these roads; and (2) the doctrine regarding exhaustion of administrative remedies is not required or should be waived in this case, and, in any event, seeking an administrative remedy would have been a futile exercise for these plaintiffs.

III Analysis

Rule 12(b)(1) provides for dismissal of claims over which the federal court lacks subject matter jurisdiction. The plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *See Kontos v. United States Dept. of Labor*, 826 F.2d 573, 576 (7th Cir.1987). When, as here, a party moves for dismissal pursuant to Rule 12(b)(1), and disputes the Court's jurisdiction, the party invoking jurisdiction must support its allegations with competent proof of jurisdictional facts. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979); *In re: W.L.*, 1999 WL 33878, 2 (N.D. Ill., Jan. 19, 1999)

The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. *Scott v. Northwestern School of Law*, 1999 WL 134059, 2 (N.D. Ill. March 8, 1999); *see Freiburg v. Emery Air Charter, Inc.*, 795 F.Supp. 253, 256 (N.D. Ill. 1992); 5A Wright & Miller, Federal Practice & Procedure: Civil.2d §1363 at 456 (2d ed. 1990). If the motion simply challenges the sufficiency of the allegations of subject matter jurisdiction, the court must accept as true all well-plead [sic] factual allegations and draw all reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western R. Co.*, 78 F.3d 1208 (7th Cir.1996) (citing Rueth v. Envtl. Protection Agency, 13 F.3d 227, 229 (7th Cir.1993); 5A Wright & Miller §1363 at 456.

If, however, the motion to dismiss under Rule 12(b)(1) denies or disputes the truth of the jurisdictional allegations, the court may "look beyond the jurisdictional

allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir.1993) (citations omitted). Undisputed factual allegations may be accepted as true for the purposes of the motion. *Lumpkin v. United States*, 791 F.Supp. 747, 749 (N.D. Ill. 1992).

When reviewing a complaint in light of a Rule 12(b)(6) motion to dismiss, the district court must take all of the plaintiffs' well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiffs. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir.1997). Dismissal of the complaint should be granted only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief.' " *Id.* at 1319-20 (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)). "It is true that the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which a claim is based. Nevertheless, a plaintiff must allege sufficient facts to outline the cause of action, proof of which is essential to recovery." *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir.1985). The essence of a defendant's Rule 12(b)(6) motion is not that the plaintiff has pleaded insufficient facts, it is that, even assuming all of his facts are accurate, he has no legal claim. *Johnson v. Revenue Management Corp.*, 169 F.3d 1057, 1059 (7th Cir.1999)

As the Supreme Court of the United States stated in *Scheuer v. Rhodes*:

> When a federal court reviews the sufficiency of a complaint, . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

416 U.S. 232, 236 (1974)

A. Count I – FS lacks authority to close roads

None of the parties in this case disputes that, under the Constitution, Congress has the authority and responsibility to manage federal land. U.S. Const. art. IV, §3, cl. 2 ("Congress shall have power to . . . make all needful Rules and Regulations respecting . . . Property belonging to the United States. . . . "). By statute, Congress had delegated this authority to agencies such as the Forest Service, which are obligated to oversee the management of national forest lands and protect the natural resources found therein. *See Mountain States Legal Foundation v. Espy*, 833 F.Supp. 808, 819 (D. Idaho 1993); *see also* 36 C.F.R. §212. 261. Barring ownership issues, the decision to close or restrict uses of roads within FS land is committed to the discretion of the FS. 36 C.F.R. 212.5.

The plaintiffs' complaint in Count I challenges the FS' authority to regulate the use of and apply restrictions to "public" roads located within FS property and is based on the assertion that unnamed individuals and/or entities hold "prior existing rights, including pre-existent road easements." Plaintiffs do not assert in their complaint that they are the holders of these easements (and even concede in their response to the motion to dismiss that they are not) but state that they are merely "users of

public resources" who contend that the FS did not have authority to issue these closures.

The problem with the complaint, and the reasoning in the response to the motion to dismiss, is that the premise of Count I, and the only argument raised in it, asserts that easements exist which preclude the FS from regulating the uses along these roads. Based on that argument, the only way the plaintiffs may even begin to prevail on Count I is to prove that individuals(s) [sic] and/or other entities own these easements (although merely proving the existence of the easements, however, would not end the dispute). It is clear from the plaintiffs' complaint that they wish the Court to find, acknowledge and enforce what they claim are existing easements over and on the FS roads in question. Such a claim indisputably would involve this Court in deciding (1) whether such easements exist, (2) what parties own such easements, (3) whether or not such easements have been abandoned, and (4) what rights or incidents of use such easements convey to these particular plaintiffs.

The Court understands that the plaintiffs do not themselves claim or seek title to the property in question, and furthermore, the Court is well aware and agrees with the plaintiffs that they very likely would not be the proper parties to do so. But without a basis upon which to claim either ownership or the incidents of ownership, these particular plaintiffs are without cause before this Court.

A legal easement is an estate in land. 25 Am.Jur.2d *Easements* §2 (1996); 20 Am.Jur 2d *Covenants* §151 (1995). An easement must be established at law before a court

will grant an injunction restraining interference with it, unless the complainant's right to the easement is clear. If, however, as here, a party's right to an easement is involved in a substantial dispute, no injunction will be granted until the easement claim has been established at law. 25 Am.Jur.2d *Easements* §2 (1996). The Court may not just accept that these easements exist, of course. The party claiming an easement, especially a prescriptive easement, must prove its existence, generally by clear and convincing evidence. *Id.*

The plaintiffs would like the Court to decide that the FS action regarding the roads was wrong, not because of law wrongly applied, but because of the alleged existence of "[r]ecorded road easements, maps predating the Forest, and the statement of private citizens and public officials that the Burke Branch and Atwood Ridge roads were established, either by grant or prescription, prior to the purchase of the underlying fee estates." The only way for the Court to conduct such an exercise would be to determine who has title, and in what form, to the land in question within the SNF. The plaintiffs admit both in their complaint and in their response to the motion to dismiss that they believe the FS does not have authority to close these roads (to equestrian use) because they assert that the FS does not own the roads. The plaintiffs cite vaguely to Illinois law regarding easements, but such reliance does not further their cause. In Illinois, almost exclusively, claims to prove the existence and scope of easements are brought under actions to quiet title in the disputed property. In case after case in Illinois regarding easement disputes, the basic fact emerges that actions to quiet title are how these issues are decided.

Many claims in Illinois involving the claimed right to an easement and its enforcement ultimately have been resolved in quiet title claims. The title of the action or the characterization of the pleadings is immaterial in these cases. *See Eden v. Eden*, 34 Ill.App.3d 382, 386, 340 N.E.2d 141, 145 (1st Dist. 1975) (character of a pleading determined from its content), and *Deasey v. City of Chicago*, 412 Ill. 151, 157, 105 N.E.2d 727, 730 (1952) (a court may consider the ultimate efficacy of a claim in considering a motion to dismiss). In actions of this type in Illinois, courts typically look to the nature of the relief sought rather than the way in which the plaintiffs characterize their claims. *See Aebischer v. Zobrist*, 56 Ill.App.3d 151, 154, 371 N.E.2d 1003,1005, 13 Ill.Dec.911, 913-14 (5th Dist. 1977). And yet, in the instant case, the plaintiffs assert that this is not a suit to quiet title but rather one to determine the authority of the FS to take the disputed action.

The plaintiffs, however, may not have it both ways. If they wish to assert the existence and violation of easements with regard to the roads in questions [sic], they (or other proper parties) must bring a proper action before this Court to do so. If they wish to challenge the authority of the FS to make decisions of this type, they must first exhaust their administrative remedies within that agency, and then properly bring an action before this Court claiming that the FS exceeded their authority in this area (without reference to title of land or the existence of easements).

The defendants are correct that most actions under the Quiet Title Act concern the incidents of land ownership and not ownership per se. *See, e.g., Block v. North*

Dakota ex rel Board of University & School Lands, 461 U.S. 273-287, 103 S. Ct. 1811, 1819, 75 LED.2d 840, 853, (1983) (right to issue oil and gas leases); *Town of Beverly Shores v. Lujan*, 736 F.Supp. 934 (N.D.Ind.1989) (right to destroy easements). The case cited by the defendants, *Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982), is more on point than the cases cited by the plaintiffs to support their action. In that decision, the court of appeals determined that, despite how a plaintiff characterizes its cause of action, a court must look to the *essence* of the action to see if it involves an action to quiet title. "Litigants cannot circumvent the provisions of the Act by drawing fine distinctions between the incidents of land ownership and ownership itself." *Hat Ranch, Inc. v. Babbitt*, 932 F.Supp.1, 2 (D.D.C. 1995); *see McClellan v. Kimball*, 623 F.2d 83 (9th Cir. 1980).

In the instant case, the Court believes that the plaintiff is attempting to ask the Court to perform an even *finer* task – to not only make fine distinctions between ownership of this property and the incidents of its use, but also to do so while plaintiffs also claim outright that the defendants do not completely and clearly own the property in question. The Court cannot perform that task without first determining the validity of the plaintiffs' claim regarding the existence of these easements. Therefore, the Court believes that the essence of Count I involves a determination of who owns what property rights to the land in question, i.e., to quiet title in that property.

In *Beverly Shores*, the dispute was more clear-cut, but the court's decision still provides illumination to the instant case. In *Beverly Shores*, the dispute centered

around the government's ownership interest in real estate and the incidents of that ownership. The district court determined that disputes regarding title to real property, even regarding the incidents of uses of that property, to which the United States claims an interest falls exclusively within the provisions of the Quiet Title Act, 28 U.S.C. §2409a. That court ruled that the plaintiffs might not seek judicial review pursuant to the APA, to determine competing claims to and uses of real property to which the USA claims interest. The court refused to grant the requested injunction and ruled that the court did not have jurisdiction. *Beverly Shores*, 736 F.Supp. at 944.

The Court finds that the government is absolutely accurate that to seek to quiet title in estates in land(s) of the United States government, the only and proper way is to bring an action under the Quiet Title Act ("QTA"). 28 U.S.C. §2409(a). The Quiet Title Act provides a limited waiver of the sovereign immunity of the United States and allows the United States to be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. §2409a(a).

When this claim is closely examined, the Court believes that, like *Hat Ranch*, Count I of this complaint is none other than "an attempt to structure a constitutional challenge to federal ownership of public lands." *Hat Ranch v. Babbitt*, 932 F.Supp. 1, 1 (D.D.C. 1995). This is so, not *in spite of*, but precisely because the claim centers around the incidents of uses of this property and who may properly make decisions concerning both the land itself and the incidents of its uses. The assertions in

Count I specifically and unabashedly decry the FS' authority to regulate these roads and unambiguously claim that other unnamed individuals/entities own easements within the disputed property. The conclusion is inexorable that such claims involve challenges to the full and complete title of the United States to this property.

If the plaintiffs seek to challenge a decision of the FS, the Court points them to the administrative appeals process followed by that agency. If the plaintiffs seek to challenge the FS authority to regulate property within the SNF based on asserted easements (express or prescriptive), they must, under Illinois law, bring an action to quiet title and seek to prove their claims that such easements exist and give them standing to seek redress before this Court. Since the complaint fails to allege that the suit seeks to adjudicate a disputed title to lands of the United States, the Court does not have jurisdiction. The Court **GRANTS** the defendants' motion to dismiss Count I.

B. Count II – The designation of RNA's violates the APA

The plaintiffs are correct that federal courts have subject-matter jurisdiction over claims that an agency has violated the APA pursuant to 28 U.S.C. §1331. *Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 984 (1977); *Rueth*, 13 F.3d at 231. In order for district courts to have subject matter jurisdiction over claims involving APA violations, however, the plaintiffs must have exhausted the administrative appeal process. *Glisson v. United States Forest Service*, 55 F.3d 1325, 1328 (7th Cir. 1995); 36 C.F.R. §217.18.

The plaintiffs in this case have not done so; therefore, the Court does not have jurisdiction over their complaint.

The plaintiffs allege that the FS acted arbitrarily, capriciously and not in accordance with the law when it designated the Atwood Ridge and Burke Branch areas of the SNF as Research Natural Areas ("RNA's"), in September, 1990, and March, 1991, respectively. The FS documented both of these decisions in a Decision Notice accompanied by a Finding of No Significant Impact ("FONSI"). At the time, federal regulations allowed for public administrative appeals. 36 C.F.R. §217 (revised July 1, 1990). Under those regulations, decisions such as these could be appealed for forty-five (45) days, with judicial review prior to exhaustion of these administrative remedies considered premature and inappropriate. *Id.* at §217.8(a)(2) and §217.18. The plaintiffs did not seek administrative review of these RNA decisions during this time and to the Court's knowledge, still have not done so.

The defendants are correct that exhaustion of administrative remedies is a doctrine strongly-adhered to in the Seventh Circuit. *See Glisson*, 55 F.3d at 1326. The plaintiffs urge the Court to overlook this tradition by emphasizing the difference between "statutorily-mandated" exhaustion requirements and "administratively-required" exhaustion. But to this Court, and to the Seventh Circuit, that is a difference without a distinction in cases like this one. *See Glisson*, 55 F.3d at 1325-27.

As this Court and the Seventh Circuit recognized in *Glisson*, exhaustion of administrative remedies is "a traditionally judge-made doctrine now codified in cases governed by the section 10(c) of the Administrative

Procedure Act." 5 U.S.C. §701 et seq. The appellate court in *Glisson* recognized that in cases in which a specific statute does not mandate administrative remedy exhaustion, the district court does have discretion as to whether or not to apply the common-law doctrine. The Seventh Circuit counseled courts to apply the doctrine in those cases "with due regard for its underlying purpose and for considerations that may in particular cases counsel for a waiver." *Id.* at 1326; *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S. Ct. 2457, 2466, 45 LED.2d 522 (1975). In general, the appellate court encouraged waiver of the exhaustion requirement if (1) the appellate process could not give the plaintiff the relief he sought; (2) if the particular agency placed "unreasonable restrictions on access" to the appeals process; or (3) the delay exhaustion naturally entails would cause irreparable harm to the plaintiff. *Id.*

In the instant case, the Court does not find that any of these factors exist that might warrant waiver of the exhaustion requirement. The plaintiffs merely state that there was "substantial doubt as to the ability of the Forest Service to grant effective relief" because of a 1988 settlement agreement which the plaintiffs contend bound the FS to the RNA designations and because, as the plaintiffs state, "the Forest Service was either biased or had predetermined the issue." The Court finds those arguments unpersuasive, as the Court is unaware of any provision of the 1988 settlement agreement that would have in any way realistically prevented or forestalled the plaintiffs from appealing the FS designation of the RNA's. In addition, to say that exhaustion of administrative remedies should be waived because of bias regarding a predetermined decision belies the entire notion of administrative

appellate procedure. Perhaps the individuals responsible for any given administrative decision do harbor a "bias" toward and in favor of their decision; such "bias" is inherent in any administrative decision, but the administrative appeals process is designed to unearth, explore and evaluate those circumstances in which the decision-making process led to a faulty or unlawful result. Officials involved in the review and appeals process seek to investigate and analyze such decisions to assure that agency decisions are soundly based on policy and law and not just on biased or predetermined opinions.

This Court agrees with many others that the doctrine of exhaustion "cuts down on the work of the courts, preserves the integrity and autonomy of the administrative process, and ensures that when the administrative proceeding does come before the court, the court will have before it the mature, considered, and final articulation of the basis of the agency's action." *McCarthy v. Madigan*, 503 U.S. 140, 145-56, 112 S. Ct. 1081, 1086-87, 117 L.Ed. 2d 291; *Weinberger*, 422 U.S. at 765, at 2466. "The doctrine is closely related to the doctrines of finality, mootness, and primary jurisdiction, all of which are designed to postpone judicial intervention until the plaintiff's need for judicial help is clear and the record is adequate to enable the intelligent performance of the judicial function." *Glisson*, 55 F.3d at 1327.

FS regulations require exhaustion of administrative remedies for decisions like the ones at issue here. "It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust

the procedures available under this part. This position may be waived upon a written finding by the Chief [of the Forest Service]." 36 C.F.R. §217.18. Without finding any reason to waive the administrative regulation requiring exhaustion, the Court finds that plaintiffs failed to exhaust their administrative remedies, and that, therefore, the claim in Count II is premature and inappropriate according to the APA. The Court finds that the plaintiffs have not met their burden of supporting their jurisdictional allegations with competent proof.

The Court, accordingly, finds that jurisdiction is lacking and **GRANTS** the defendants' motion to dismiss Count II.

IV. Motion to intervene

In consideration of the Court's decision regarding the defendants' motion to dismiss and the corresponding judgment entered simultaneously, the Court **DENIES AS MOOT** the motion to intervene pursuant to Fed.R.Civ.P. 24(a) and (b), filed by Kristi Hanson, Cathie Hutcheson, Martha Crothers, the Sierra Club, the Regional Association of Concerned Environmentalists and the Illinois Audubon Society (doc. 15).

V. Conclusion

1. The Court **GRANTS** the defendants' motion to dismiss Count I (doc. 12).

2. The Court **GRANTS** the defendants' motion to dismiss Count II (doc. 12).

3. The Court **DENIES AS MOOT** the motion to intervene (doc. 15).

IT IS SO ORDERED.

Dated: July 21, 1999.

/s/ **J. Phil Gilbert**
J. PHIL GILBERT
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SHAWNEE TRAIL CONSERVANCY, et al.,	)	
Plaintiffs,	)	
vs.	)	**CASE NO. 98-CV-4248-JPG**
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

(Filed Jul. 21, 1999)

This action came before the Court upon a motion to dismiss for lack of subject matter jurisdiction. The Court has rendered the following decision;

IT IS ORDERED AND ADJUDGED that this matter is dismissed for lack of subject matter jurisdiction. Plaintiff shall take nothing from this action.

DATE: July 21, **1999.**

NORBERT G. JAWORSKI,
CLERK

/s/ K. Jane Reynolds
By: K. Jane Reynolds,
Deputy Clerk
cod 7/22/99

APPROVED: /s/ J. Phil Gilbert
J. PHIL GILBERT
CHIEF JUDGE

U.S. Constitution: Article IV – Property Clause

Section 3, clause 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Quiet Title Act, 28 U.S.C. § 2409a. Real property quiet title actions.

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may

retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received

notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be –

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

Administrative Procedure Act, § 10(c), 5 U.S.C. § 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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36 C.F.R. § 217.18

TITLE 36 – PARKS, FORESTS, AND PUBLIC PROPERTY

PART 217 – APPEAL OF REGIONAL GUIDES AND NATIONAL FOREST LAND AND RESOURCE MANAGEMENT

Sec. 217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part. This position may be waived upon a written finding by the Chief.

APPEAL SETTLEMENT AGREEMENT BETWEEN THE FOREST SERVICE, EASTERN REGION AND AUDUBON COUNCIL OF ILLINOIS, E. ALAN ENGLEHART, ILLINOIS DEPARTMENT OF CONSERVATION, AND SIERRA CLUB, *ET. AL.*

The purpose of this document is to record agreement among the USDA Forest Service and the appellants of the Shawnee National Forest Plan appeals number 1861, 1871, 1883, and 1873. This statement of agreement lists the points of agreement reached to resolve issues that formed the basis of the Plan appeals.

BACKGROUND

On November 24, 1986, the Regional Forester of the Eastern Region of the Forest Service signed a Record of Decision that approved the Land and Resource Management Plan for the Shawnee National Forest. This plan provides direction for the management of the Shawnee National Forest over a 10-15 year period.

The appeal process is an administrative process for concerned citizens to request review of the decision to adopt the plan. Four appeals were filed, disagreeing in part with the process used to develop this plan, or with the [sic] some of the actions of the plan itself. Appellants chose to appeal the decision to implement the plan.

RESOLUTION MEETINGS

In an attempt to resolve the issues of the appeals on a local level, a series of informal meetings were held. Participants at those meetings included the appellants, the Forest Service, and those who intervened on behalf of the existing direction in the Forest Plan. The meetings had a two-fold purpose:

1) To allow for free and open discussion of the management practices, methods or processes that were the reason for the appeals.

2) To come to agreement on a management plan for the Shawnee National Forest that would best meet the needs of the American people.

What follows are the points of agreement that were reached among the appellants (Sierra Club, et al; Alan Englehart; the Audubon Council of Illinois; the Illinois Department of Conservation) and the U.S.D.A. Forest Service. Also included in the discussions were those who intervened on behalf of the existing direction in the Forest Plan. These Intervenors were:

Roy Janson, The American Motorcyclist Association
J. James Eidel, Geological Survey Division, Illinois Department of Energy and Natural Resources
Larry Benard, the "Over the Hill Gang", ATV riders
Jimmy Joe Humm, Pope/Hardin County ORV group
V.A. Evans, Ozark Mahoning Co.
Gill Montgomery, Geological Consultant
Brian S. Unnerstall, East Perry Lumber Co.

Mark Donham, Association of Concerned Environmentalists
Mark Salus
Jim Bensman, Great Lakes Chapter, Sierra Club

Reaching these agreements was not an easy task. The variety of opinions and values of the participants coupled with the lack of absolutes in forest management led to frank and extended discussion. However, the common purpose of "best" management of the Shawnee National Forest for the American people led participants to prevail in finding solutions that were acceptable to all involved.

Amendments and changes to the Forest Plan or changes in its implementation, where called for by the agreements in this document, will be carried out through the proper procedures in accordance with the requirements of the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA), and other appropriate laws and regulations.

Where the group could not reach a final agreement due to insufficient information or analysis, they agreed to establish a process for providing the information or analysis.

For clarity [sic] sake, the points of agreement are grouped by issue in this document. In reality, many of the issues are interrelated. A resolution of one issue may influence several others.

AGREEMENTS

The USDA Forest Service and appellants agree to the following:

I. USE OF PESTICIDES

A. A sub-regional EIS on pesticide use will be prepared.

II. RIPARIAN AREAS

A. "Riparian Area" will be defined as "All lands, adjacent to or associated with perennial and intermittent streams, encompassed by the 100 year floodplain or having a soil type defined as hydric by the Fish & Wildlife Service National Wetland Inventory Criteria." The Forest Plan glossary will be amended to include this new definition of Riparian area, and the definition of "wetland" will be changed to conform with the definition used in FSM 1526.03 Shawnee Supplement.

B. A separate management prescription 2.3 will be used for the Riparian Areas. This prescription will apply to all riparian areas except for Oakwood Bottoms greentree reservoir. Oakwood Bottoms will remain under prescription 1.3. The 2.3 management prescription Standards and Guidelines will apply and supersede other less restrictive management area Standards and Guidelines for those practices permitted under the mapped management area prescription.

C. The predominant silvicultural system within riparian areas will be uneven-age management. Harvest method may be either individual tree selection or group selection with group size between 1/4 acre and 2 acres. A draft copy of Management Prescription 2.3, to be added to the Shawnee Forest Plan, is attached.

D. New openings placed in riparian areas will be located adjacent to uplands rather than

located in the interior of riparian areas where at all possible.

E. Wildlife openings will be created only by utilizing openings resulting from other resource management activities, such as log landings or mineral activities, or by use of existing open-land. These new openings will be maintained only by mowing or prescribed burning.

III. FILTER STRIPS

The Forest Plan will be amended to incorporate the following changes into the Forest-wide Standards and Guidelines:

A. Riparian area filter strips will be renamed "Filter Strips." The glossary in the Forest Plan will be amended to reflect this change.

B. All perennial and intermittent streams shown on USGS quandrangel maps and those streams meeting the criteria on page IV-45 of the Forest Plan (1st paragraph of Riparian Area Filter Strips) will have a filter strip.

C. Minimum width of filter strips adjacent to perennial streams will be 200 feet. The filter strip width may be wider depending on slope as determined by applying the standards on page IV-45 of the Forest Plan. The minimum width of filter strips on intermittent streams will be 100 feet but as with perennial streams, the filter strips may be wider depending on slope. Filter strip widths will be measured from the edge of the stream.

D. The Forest Plan will be amended to include the information in FSM 2506.1, Shawnee Supplement. This information is currently incorporated only by reference. The amended Plan will have

this information directly listed as an appendix. The following changes will be added to the supplement:

1. Seed mixtures will be revised to eliminate problem exotics, based on consultation with the Illinois Department of Conservation.

2. Page 27, Paragraph 3: Wood chips or other mulch material will be placed immediately following soil exposure when needed to reduce soil erosion.

3. Page 27, Paragraph 2: Revegetate disturbed areas as soon as practical following soil exposure, but at least in the same growing season as the exposure occurs.

4. Page 27, Paragraph 2: Consult references such as the *Greenbook* (ASWCD), *Technical Guide* (SCS), and *Standards and Specifications for Soil Erosion and Sediment Control* (IEPA) in developing streambank erosion control measures.

5. Page 28: Trails adjacent to streams will be hardened and stream crossings reinforced.

6. Page 28: Seasonal erosion control measures will be taken where necessary to maintain streambank integrity.

7. Page 28: Delete reference "in loess soil over 10 percent slope" ie. no bare soil will be allowed to overwinter.

E. New wildlife openings will not be created in filter strips.

F. Forestwide, the highest priority for elimination of openings is within filter strips.

G. Road construction will be prohibited on slopes greater than 20 percent in filter strips along perennial streams. Road construction will be prohibited within 30 feet of intermittent streams when the slope exceeds 20 percent. Stream crossings will be minimized.

H. Landfills will be prohibited within filter strips.

I. The following areas adjacent to streams, are unsuitable for timber production. These restrictions do not apply to lakes and ponds:

1. That portion of the filter strip within 50 feet of perennial streams.

2. That portion of the filter strip within 50 feet of intermittent streams adjacent to bottomland forest types.

3. That portion of the filter strip within 10 feet of intermittent streams adjacent to upland forest types.

Within these areas, timber will only be harvested when necessary to meet Natural Area management objectives, for the elimination of exotic species, for the management of threatened, endangered, sensitive or forest listed plant and animal species or when required to clear utility or travelway rights of way.

J. Individual tree selection is the only harvest method which may be considered for use within that portion of the filter strip adjacent to perennial steams outside the 50 foot no cut strip.

K. The mining of common variety minerals in streams is prohibited. Minor use of common variety minerals for on-site road maintenance will be permitted.

L. Within filter strips adjacent to perennial streams, the following are prohibited:

1. Surface mining of Federally-owned minerals including sand and gravel.

2. Location of mine shafts is prohibited.

M. ATV use is prohibited within streams and filter strips except for stream crossings on roads.

IV. ALL TERRAIN VEHICLES (ATV's) /OFF ROAD VEHICLES (ORV's)

A. The Forest Service will prepare EIS that addresses the issue of ATV use, either a separate EIS, or one done in conjunction with the EIS to amend the Forest Plan. The map (on file in the Forest Service office in Harrisburg, IL) showing potential ATV routes will be input into the EIS. The intent of this analysis will be to provide 286 miles of ATV opportunities within the corridors mapped, or along alternate routes. Routes will be implemented unless significant biological, social, or economic effects are identified which cannot be mitigated.

B. The EIS will analyze and evaluate current and potential impacts arising from the operation of ATV's on soil, water, vegetation, fish and wildlife, and cultural and historic resources. The designation of travelways will be in compliance with FSM 2355.14.

Appellants and intervenors will be contacted during the scoping phase of the ATV EIS analysis and invited to attend a meeting held between the release of the draft and final EIS.

C. The Forest Plan will be amended to clearly state that roads and trails are closed to ATV use unless signed as a designated ATV travelway.

D. ATV use is prohibited within streams and filter strips, except for stream crossings on roads.

E. The Forest Plan will be amended to show revised boundaries for management areas where ATV use opportunities are potentially feasible and management areas where ATV use is prohibited.

F. A closure order prohibiting all motorized use (except for administrative use) will be issued for the RARE II areas including Burke Branch and Ripple Hollow within 45 days after signing this Settlement Agreement.

G. The Forest Service will concentrate ATV enforcement efforts on Special Management Areas (Research Natural Areas, Natural Areas, Cultural Resource Sites, RARE II areas including Burke Branch and Ripple Hollow, candidate Scenic and Wild River corridors, etc.) The Forest Service will enforce closure prohibiting use of vehicles off roads (cross country) throughout the Forest.

H. The Forest Service will pursue the establishment of a permit system for ATV use on the National Forest. The intent is to provide for contact with ATV users prior to their riding on the Forest. This personal contact would allow

ATV users to receive information on rules and ATV riding opportunities.

H. Monitoring and Evaluation

1. The following will be added to Forest-wide standards and guidelines.

Conditions Found Through Monitoring

Conditions	Action to be Taken
- Impacts are within benchmarks	- No action required.
- Impacts unacceptable.	- Take appropriate action such as seeding, revegetating, waterbarring etc. If unacceptable impact is likely to become a considerable adverse impact, close immediately.
- Use is causing or likely to cause considerable adverse effects.	- Immediately close the area, trail, or road until the adverse effects have been eliminated and measures have been implemented to prevent occurrence.

2. The following definition of considerable adverse effect will be added to the glossary in the Forest Plan:

"A considerable adverse effect is one which is or may become

irreparable because of the impossibility or impracticability of performing corrective or remedial measures."

3. The forest will develop specific monitoring and enforcement procedures as a part of the EIS on ATV use. These procedures will include provisions for monitoring the following resources and uses, and describe benchmark conditions, unacceptable impacts and considerable adverse effects for areas within designated travelways and areas outside of designated travelways. Data from monitoring will be used to determine where impacts fall within the conditions described. The action taken in response to the condition found will be as listed above.

   The following are draft examples of the description of conditions to be included in the procedures. Similar descriptions will be developed for the other resources and uses listed.

WITHIN DESIGNATED TRAVELWAY

Example:

Benchmark Condition

Soil – Loss occurs due to water erosion, wheel or track displacement and maintenance activities. Compaction and changes in soil structure expected.

Unacceptable Impacts

Loss occurs at a rate exceeding the capability of normal maintenance efforts, surface replacement and reconstruction to retain the travelway in a usable condition.

Considerable Adverse Effects

Loss occurs at a rate that the travelway becomes impractical to repair.

OUTSIDE DESIGNATED TRAVELWAY

Example:

Benchmark Condition Soil

– Loss occurs primarily from natural sources, occasionally and locally accelerated by ATV's operating off designated travelways. Some deposition occurs.

Unacceptable Impacts

Accelerated loss results from dusting, water erosion and wheel and track displacement due to more than occasional ATV use outside designated travelway. Number of "established" routes is increasing. Active erosion is spreading and is being extensively deposited or transported. Site productivity is declining.

Considerable Adverse Effects

Loss is or has occurred at a rate that will make rehabilitation difficult and complex to repair.

Other resources and uses to be defined in the same manner include:

Water Quality Vegetation Wildlife Public Safety

Use Conflicts Visual Resources Historical/Cultural Resources

The monitoring procedures developed in conjunction with the new EIS will be based upon comments already received, comments still to be received, and information and data collected from resource specialists from the Forest Service, other agencies, universities and other groups. The procedures will provide technical guidance, monitoring techniques, frequency of monitoring and measurable criteria that can be used to determine/verify impacts. As new information and techniques become available, the monitoring procedures will be revised.

At a minimum, all travelways will be monitored three times each year.

1. Monitor after December 15 when the seasonal closure goes into effect.
2. Monitor before travelways are open for use in the spring.
3. Monitor about July 1 after the heavy spring use season.

This frequency will provide data on a continuing basis to assess the effectiveness of

the seasonal closure on resource impacts and use. Data and information collected will aid in identifying problem and sensitive sites that will require increased monitoring efforts, frequency of monitoring needed and the type of monitoring techniques needed. Monitoring may be more frequent, depending on weather conditions and expected use levels.

4. Enforcement

Amend the forestwide standard and guides as follows:

"Enforcement of ATV vehicle use regulations will be coordinated with state and local law enforcement agencies. Road closure orders will be used to designate roads for ATV use as well as prohibit ATV use on areas, trails, and roads.

The Forest Service will develop forestwide law enforcement procedures for ATV use. These procedures will be supplemented with a ranger district annual operating plan to reflect each districts needs. Format for the enforcement procedures will follow the guidelines given in Forest Service Manual 5311.

V. HABITAT FOR FOREST INTERIOR SPECIES

A. The Forest Plan will be amended to include a 3.3 management area which will address management of Forest Interior Management Units (FIMU's) outside of 8.2, 9.3 and 9.4 management areas. The areas to be designated as FIMU's are currently delineated on a map on file at the Supervisor's Office in Harrisburg, IL. Upon completion of the supplementary EIS, the

3.3 FIMU management areas will be mapped on the new Forest Plan map. The boundaries of FIMU's located outside of 3.3 management areas will be shown on maps included in the Planning Record, but not on the Forest Plan map.

The following table lists the designated FIMU's and the management prescription they will be assigned to:

SITE NO.	MGT. PRESC.	SITE NO.	MGT. PRESC.	SITE NO.	MGT. PRESC.
1	3.3	8	8.2	16	9.3
2	3.3	9	3.3	17	9.3
3	9.3	10	9.3	18	3.3
4	9.3	11	3.3	19	9.3
5	9.4	12	3.3	20	3.3
6	9.4	13	3.3	23	9.3
7	9.3	14	3.3		

Note: Site numbers 15,21,22,24 and 25 were eliminated from FIMU designation during evaluation. Site number 25 will be managed as 2.2 (upland portion) and 2.3 (riparian portion).

B. The Forest Plan will be amended to include standards and guidelines for FIMU management. The new standards and guidelines will be based on the following:

1. Standards and Guidelines that apply to FIMU's, forest-wide:

a) Forest Interior Management Units will be managed toward a desired condition of contiguous, closed-canopy forest, capable of sustaining a fully functioning natural upland or bottomland hardwood forest ecosystem, including viable

populations of forest interior plant and animal species. Forest management practices selected will be those that minimize opening the forest canopy to the greatest extent possible.

b) The minimum size of FIMU's will be 1100 acres with a 100 acre core. There will be no cap on the size of FIMU's.

c) Monitoring

1) Forest wildlife populations and ecosystem conditions will be monitored and analyzed to assess progress toward the desired future condition.

2) Monitoring and research should focus attention on the fragmentation issue and that efforts should be made to monitor the impacts of activities that affect forest interior species.

3) Population monitoring will assess reproductive success in addition to species presence (ie. sight/song bird census). Monitoring data and population trends deduced from monitoring will be used to evaluate impacts of forest management. Monitoring and analysis of forest management practices will address the cumulative impacts on forest interior species and ecosystems.

4) Data from population monitoring and analysis will be used to refine estimates of minimum viable populations of forest interior management indicator species.

5) The Scarlet Tannager will be a monitored species for evaluating the effects of management practices on the Forest Interior Species.

2. Standards and Guidelines for FIMU's located in 8.2, 9.3 and 9.4 Management Areas. (Note: 8.2 management objectives will not be compromised by the objectives of the FIMU.)

a) Wildlife Opening and Waterhole Management:

1) Management of existing openings and Waterholes in FIMU's in 9.3 areas will be discontinued immediately.

2) Management of existing openings in FIMU's in 8.2 areas will not be allowed.

3) Management of existing openings by burning or mowing in FIMU's in 9.4 areas will be allowed outside the core areas.

b) Road Management

1) Road obliteration in these areas will be a high priority.

2) Efforts should be made to allow canopies over existing roads to close. Daylighting of roads will be discouraged to the extent possible.

c) Trail Management

1) Horse/hiking trail location should be kept on the perimeter if possible to maintain the integrity of the area. No new trails should be located in the 100 acre core area.

2) Efforts should be made to allow canopies over existing trails to close. Daylighting of trails will be discouraged to the extent possible.

d) Mineral Activities – Where mineral extraction/exploration is permitted, locate drill sites

and shafts where possible in existing openings. Access roads should be allowed to revegetate naturally. For extraction, tailing sites and concentration facilities should be located outside the FIMU, where possible.

e) Reforestation – As determined in the Opportunity Area analysis process, allow openings not designated as herbaceous openland to revegetate naturally.

f) Fire Management

1) Fire management should be consistent with 8.2, 9.3 and 9.4 management objectives.

2) Maintenance of fire dependant natural communities is permitted.

g) Land Ownership – Land ownership consolidation will be a high priority.

h) Core Area Management – Core areas should be located to avoid 8.2 management areas where they are not compatible with the FIMU objectives.

3. Standards and Guidelines for 3.3 management areas

a) Wildlife Opening, Waterhole and Fish Pond management

1) Management of wildlife openings located in the 100 acre core area will be discontinued immediately.

2) Wildlife openings and waterholes will only be maintained where they are more than 1/2 mile from the perimeter of the 100 acre core area.

3) No new wildlife openings will be created.

4) Waterhole construction may be considered in regeneration areas more than 1/2 mile from the perimeter of designated core areas based on a need identified during the Opportunity Area analysis.

5) Existing fish ponds within FIMU's may be maintained. Now ponds may be constructed if more than 1/2 mile from the perimeter of designated core areas.

b) Timber Age Class Distribution – Seventy percent of the area should be in hardwood or conifer over 50 years old.

c) Harvest Systems and Harvest Period

1) The predominant harvest system will be even-aged management with clear cutting expected to be the primary harvest method. Uneven-aged management may also be considered. Clearcuts will average 25 acres with a maximum size limit of 40 acres. The rotation age for the upland hardwood component is 160 years.

2) Pine should be managed under an even-aged management system.

3) Harvest activities will be designed to leave the minimum amount and length of edge between the opening and the forest. All edges will be feathered.

4) Forest Plan monitoring requirements will be revised to require collection of baseline data on Forest Interior Species prior to timber harvest within FIMU's.

5) To reduce the impacts on ground nesting birds, no timber activities should be allowed between April 1 and July 15.

6) Timber harvest will be designed to retain at least 750 contiguous acres of the FIMU intact.

d) Harvest Level

1) No more than 300 acres of hardwood harvest will occur in FIMU's in this 10 year period.

2) No more than 200 acres of pine harvest will occur in FIMU's in this 10 year period.

3) No more than five FIMU's will be entered for timber harvest during this 10 year period.

4) The purpose for timber harvest is to collect information for improving management of FIMU's both through monitoring and research. Baseline data will be collected prior to timber harvest.

e) Reforestation – As determined in the Opportunity Area analysis process, reforest openings not designated as herbacceous openland.

f) Vegetative Management – Vegetative management activities that reduce vertical diversity should not be done.

g) Road/Trail Management

1) Use of roads and trails for administrative use will be permitted.

2) On existing roads, efforts should be made to allow canopies to close over the roads.

3) Daylighting of roads and trails should be discouraged to the extent possible.

4) Where possible, the width of newly constructed roads will be designed to maintain a closed canopy.

5) Where possible, entry to harvest sites should be on existing roads and not disturb the contiguous forest maintained around the core area.

6) Construction of utility corridors, secondary highways, etc., should avoid 3.3 management areas wherever possible.

7) Hiking and horseback trails should be kept on the perimeter if possible to maintain the integrity of the area. Trails needed to meet Forest objectives should be located/ relocated outside the management area whenever possible. No new trails will be located in the 100 acre core area.

8) ATV travelways will be limited to connecting corridors. No loop travelways will be provided. Travelways should be kept on the perimeter if possible to maintain the integrity of the area. No ATV travelways will be located in the 100 acre core area.

h) Mineral Activities – Where mineral and oil and gas extraction/exploration is permitted, locate drill sites and shafts where possible in existing openings. Access roads should be allowed to revegetate naturally. For extraction, tailing sites and concentration facilities should be located outside core areas, where possible.

i) Fire Management

1) Maintenance of fire dependant natural communities is permitted

2) Prohibit prescribed burning between April 15 and July 15.

j) Land Ownership – Land ownership consolidation should be a high priority.

k) Developed Recreation Sites – Locate new developed recreation sites outside 3.3 management areas.

l) Snag Management – Snag and den tree clumps should not extend above the surrounding forest canopy.

VI. MANAGEMENT OF CAMP HUTCHINS AREA

A. The entire 2,967 acre (NFS lands) Camp Hutchins area will be managed under Prescription 9.4. The management objective for the 9.4 prescription is to study resource and ecological values and the area's potential for timber production.

B. Wildlife openings inside the two designated 100 acre core areas will be abandoned. Openings outside the core areas will be maintained using burning or mowing.

C. The 9.4 management area will be removed from the landbase considered suitable for timber production.

D. Standards and guidelines for the 9.4 management prescription will be developed during the analysis for amending the Forest Plan. Riparian area standards and guidelines will apply. Standards and guidelines will include provisions for an annual review of research and monitoring results. The guiding force in developing standards and guidelines will be to maintain the ecological integrity of the area.

VII. AREAS RECOMMENDED FOR WILDERNESS STUDY

A. Areas recommended for Wilderness Study:

The Forest Service and all appellants agree to support the study of nine areas for Wilderness. The Forest Service will amend the Forest Plan to include Ripple Hollow and Burke Branch as 9.3 management areas. The nine areas to be recommended for Wilderness study in the Forest Plan are: Lusk Creek, Burke Branch, Bald Knob, Panther Den, Garden of the Gods, Ripple Hollow, Murray Bluff, Burden Falls, and Clear Springs.

B. Standards and guidelines for 9.3 management areas:

1. Maintenance of existing wildlife openings will immediately cease in Lusk Creek, Burke Branch, and Bald Knob.

2. Maintenance of existing wildlife openings will cease within 5 years (pending Congressional action) in Panther Den, Garden of the Gods, Ripple Hollow, Murray Bluff, Burden Falls and Clear Springs.

3. Mineral exploration, including oil and gas, may be permitted in areas recommended for wilderness study for the life of the Forest Plan pending Congressional action in accordance with current standards and guidelines in the Forest Plan.

4. Mineral development may be permitted in accordance with current standards and guidelines in the Forest Plan.

5. The following sentence will be added to 2300, ORV Use in the 9.3 management prescription in the Forest Plan on page IV-183: "Permits or contracts will not be issued for recreational ORV use."

6. The first paragraph on page IV-183 of the Forest Plan under 2400 will be changed to read: "Make no investments or implement practices related to timber management, including salvage of timber, unless needed to prevent significant loss of resources on the area or adjoining areas resulting from a major catastrophic event." The second paragraph will be changed to read: "No timber harvest is scheduled." The sentence referring to salvage will be deleted from the second paragraph.

7. The following sentence will be added to the description of the desired future condition of 9.3 management areas on page IV-181 of the Forest Plan: "Management activities that maintain or enhance the wilderness character are permitted."

VII. TIMBER HARVESTING METHODS

A. The harvest methods selected are those that work toward the long term desired future condition as described in the Forest Plan. Uneven-aged management will be the predominant silvicultural system used on the Shawnee National Forest. The following changes to the Forest Plan will be made based on this assumption.

The Forest Plan will be amended to delete the 3.1/3.2 and 4.1/4.2 management prescriptions. The predominant prescription will be 2.1/2.2. The amendment will include the following standards and guidelines for the selection of harvest methods,

including the determination of where even-age management is appropriate and where clearcutting is optimum:

1. UNEVEN-AGED MANAGEMENT – will be the predominant silvicultural system on National Forest System lands where timber management activities are scheduled. This may include individual tree or group selection harvest methods.

2. EVEN-AGED MANAGEMENT – can be used only where it is determined to be an appropriate method. To judge appropriateness, the natural, economic, and social environmental effects will be evaluated on a site-specific basis. Even-aged systems can be used only when they meet the management objectives for the Forest Plan.

Even-aged management may be appropriate if any of the following situations are present.

a) Pine is the existing species.

b) Regeneration harvests within forest interior management units.

c) Wildlife habitat objectives (including regeneration at Oakwood Bottoms, MA 1.3) are not being met on private or National Forest System lands and cannot be met through uneven-aged management.

d) Stands needed to provide habitat requirements for threatened, endangered, sensitive, and forest listed species.

e) Where there is a need to create vistas or directed views which cannot be established with group selection.

f) Stands identified as having been heavily highgraded in the past and/or containing low quality timber (defined in the Compartment Prescription Handbook, Chapter 240) which will not form the basis for an uneven-aged stand using group selection.

g) Stands are present which require salvage or sanitation cuts following the occurrence of a natural or biological disaster where damage is too widespread for group selection.

3. CLEARCUTTING – may be selected only if it is determined to be the optimum method to meet the objectives and requirements of the Shawnee National Forest management plan. When even-aged systems are considered, only shelterwood or seed tree methods will be considered unless the following conditions are present, and there are at least 435 stems/ac. of acceptable advance regeneration or at least 435 stems/ac. of acceptable regeneration is expected through sprouting and seeding.

a) Pine stands to be converted to hardwood (where hardwood advance regeneration is present).

b) Pine stands to be regenerated to pine (where pine advance regeneration is present or where artificial regeneration will be used).

c) Regeneration harvests within forest interior management units.

d) Wildlife habitat needs (including regeneration at Oakwood Bottoms, MA 1.3) that are not being met on private land,

through uneven-aged management, seed tree or shelterwood methods, or other existing young (0-10 year) even-aged blocks.

e) Stands needed to provide habitat requirements for threatened, endangered, sensitive, and forest listed species.

f) Where there is a need to create vistas or directed views which cannot be established with group selection.

g) Stands identified as having been heavily highgraded in the past and/or containing low quality timber (defined in the Compartment Prescription Handbook, Chapter 240) which will not form the basis for an uneven-aged stand using group selection.

h) Stands requiring salvage or sanitation cuts following the occurrence of a natural or biological disaster where damage is too widespread for group selection.

4. A Silvicultural Guide will be developed for selecting the harvest system, applying uneven-aged harvest methods, and applying these standards and guidelines in the field on a site by site basis.

5. OLD GROWTH -- The Silvicultural Guides to be developed for the Shawnee National Forest will include a management section on old-growth conditions for wildlife habitat (similar to that found in Missouri's Forestland Management Guidelines). The following definitions will be added to the Forest Plan glossary and standards and guidelines.

a) Old growth, in terms of age-class or chronological age, should be "A stand of trees one and one-half times the rotation age for the type." (For example: data shows that old growth begins for upland hardwoods at 150 years of age).

b) Major characteristics of old-growth forest: 40 percent or more stocking of live trees greater than 14 inches DBH, average age more than 100 years for dominant trees, a multilayered canopy, large snags, large fallen logs, and evidence of tree decadence. Old growth sites (stands) should be clustered to make areas (stands) of 25 acres or larger.

B. At least 90 percent of hardwood harvest volume (excluding Oakwood Bottoms) will be from uneven-aged management. The exact percentage scheduled will be determined through the environmental analysis for the Forest Plan amendment.

VIII. HARDWOOD HARVEST LEVELS

A. The Forest Plan will be amended to include the following objectives for harvest levels, timber demand, prescriptions, acres disturbed and yearly offer:

1. The average annual hardwood volume to be sold during the first period will be up to 10 MMBF from the lands classified as suitable for timber production. In making the agreement on harvest levels, it is assumed that reaching the harvest objectives will require that approximately 3600 acres per year in 2.1 and 2.2 management areas will be entered for timber harvest purposes. The actual acres to be scheduled for harvest will be determined during the

analysis for the Forest Plan amendment and may vary depending on the harvest prescription assumed and land conditions.

2. Harvest estimates for periods 2 through 5 will be based on entering approximately the same amount of acres for hardwood harvest each period as was entered in period 1. Increases in volume would result primarily from growth rather than entering additional acres.

3. Unsold hardwood volume may be re-offered if it does not result in offering more than 133 percent of average annual hardwood volume in any given year. A sale will become "unsold" only after the guidelines of S-12 regulations have been exhausted (a maximum of 12 months).

4. Harvest under management prescription 2.1 and 2.2 may include group selection, individual tree selection, and improvement/sanitation cuts.

5. The Forest Plan requires monitoring and evaluation of Forest Plan implementation. Revisions and amendments are made as appropriate. Monitoring of the Shawnee National Forest Plan will include changes in timber demand. The capability of Shawnee National Forest to respond to those demands will be evaluated and amendments or revisions of the Forest Plan will be considered as appropriate.

IX. INTERIM TIMBER HARVESTS

A. The Forest Service will offer about 4.6 MMBF of hardwood sawtimber for sale during the remainder of the fiscal year which ends September 30,

1988. The volume will come from the following areas:

District	OA or Sale Name	Volume	Remarks
M'boro	Town Hall	.400 MMBF	
Vienna	Quarrel Creek	.650 MMBF	
Vienna	Alcorn	1.100 MMBF	
Vienna	Robnett	1.000 MMBF	*
J'boro	Opossum Trot	1.500 MMBF	**
	TOTAL	4.650 MMBF	

* The volume is that hardwood volume identified in Alternative 3 and is in addition to the volume of Pine identified in Alternative 4.

** The two harvest units in the NW part of the OA (Comp 88) are not to be cut because they are part of the unfragmented corridor to the Ripple Hollow area. The three units in the neotropical migrant bird area may be cut if needed to attain the 1.5 MMBF. Only harvest cuts that are a part of the existing five alternatives of the EA may be considered for the new decision. The total amount selected for harvest will be such that the 0-10 year age class will be between Alt 4 (6%) and Alt 5 (13%). Volume can also be obtained outside the the OA if necessary.

X. PINE MANAGEMENT (ELIMINATION OF 4.1/4.2 MANAGEMENT PRESCRIPTIONS)

A. The Forest Plan will be amended to eliminate the 4.1/4.2 management areas and prescriptions. The following standards and guidelines will be incorporated into either Forest-wide or 2.1/2.2 standards and guidelines as appropriate:

1. The goods, services and uses description will be revised to show that softwood sawlogs

and fiber are also provided and that wildlife habitat provided includes those species associated with a mix of pine, hardwood and openland.

2. The desired future condition of the land will be revised to show that hardwood trees dominate, but there are lesser amounts of softwood intermixed with hardwoods and the associated understories. Forestwide, pine stands occur on about 16 percent of the area. The land generally supports huntable populations of game species (turkey, deer, quail, and squirrels) and a wide diversity of nongame species.

3. Acquisition of land to improve age class distribution of hardwoods or improve composition of other limited vegetation types such as herbaceous openlands which increase diversity for wildlife is justified.

4. Priorities for converting pine to hardwoods:

a) Pine adjacent to natural areas where pine invasion is becoming a problem.

b) Salvage of pine (stocking below "C" level).

c) Salvage of pine (stocking between "B" and "C" level).

d) Pine in 3.3 management areas (FIMU's).

e) Pine on hardwood sites outside of FIMU's.

5. The schedule of practices for the Forest Plan will show at least 60 percent of the pine

acreage regenerated to hardwood and the remainder reforested to pine. The exact percentages will be determined through the environmental analysis for the Forest Plan amendment and site specific evaluations.

6. The amended Forest Plan will schedule pine harvest by management area and include an estimate of the acreage expected within each pine-to-hardwood conversion priority (ie. the categories listed in the priorities above).

7. Hardwoods may occur in pine stands and will not be discouraged.

8. Pine will not be encouraged nor actively discouraged in hardwood stands.

9. Natural regeneration of pine stands during this ten year period will normally occur only on hardwood sites with adequate advanced hardwood understory.

10. Pine will only be planted to reforest harvested pine plantations on pine sites (severely eroded soils and/or shallow soils) or where needed on specific sites to reduce soil erosion. Where feasible, natural regeneration of pine/hardwoods will be used to reforest pine sites.

11. Add Bobwhite Quail, Great Crested Flycatcher and Pine Warbler. Include same habitat components and minimum acceptable population levels listed for both in 4. prescriptions.

12. The Pine Warbler minimal acceptable populations apply only to the existing pine component of the management area scheduled to be retained in pine.

13. Herbaceous Openland and Old Field Successional Land

a) Prescribed burning, mowing and/or disking will be used to maintain herbaceous openlands in an open condition.

b) Other specific guidelines for the maintenance of herbaceous openlands and for old field successional lands will be developed during the analysis for Forest Plan amendment.

14. The composition objectives for 2.1/2.2 management areas will be amended to show the following:

a) Composition objective will apply to opportunity areas regardless of size.

b) Up to 2 percent permanent openings or old field successional lands in the general 2.1/2.2 management area.

c) Up to 4 percent permanent openings or old field successional lands in predominantly pine areas where Quail management is the objective.

XI. WILDLIFE OPENINGS

A. The Forest Plan will be amended to include the following standards and guidelines for management of wildlife openings in 2.,3.,6., and 9.2 management areas. Opening guidelines for Oakwood Bottoms (1.3 area) would remain unchanged from the current Forest Plan direction. Opening establishment guidelines for 2.3 and 3.3 management areas will override these general opening establishment guidelines.

1. No more than 2 percent of the total Forest acreage will be in managed wildlife openings. (Permanent openings and old field successional lands).

2. Openings should be ½-10 acres in size with an average size of 3 acres in upland areas and 1.5 acres in 2.3 management areas (riparian areas).

3. The definition of naturally-occurring herbaceous openlands will be included in the text of the standards and guidelines of the Forest Plan, as well as in the glossary. Openland will be broken into two categories:

a) Herbaceous Openlands – will be defined as in the glossary (ie. naturally occurring, such as glades, barrens, etc.).

b) Old Field Successional Lands – will be added to the glossary and defined to indicate that these are not "naturally occurring" openlands and are a result of human disturbance.

4. For lands coming into National Forest ownership, herbaceous openlands will not be artificially reforested. On old field successional lands, hardwood or pine artificial reforestation can occur if analysis shows need to retain the land in an open condition to meet Quail management objectives. If reforested, species selection will be based upon the capability of the site.

5. Existing openings (log landings, group selection cuts) should be utilized in opening construction where at all possible. However, not all existing openings need to be developed into permanent wildlife openings.

6. New openings will use the following analyses to place and determine the type of new wildlife opening needed:

a) HEP and other analyses will be done on an opportunity area to identify habitat needs of management indicator species and species of recreational interest and to assess the impacts of new openings on all management indicator species.

b) Openings will not be established where wildlife habitat analysis indicates that opening establishment would result in populations levels for any management indicator species dropping below minimum acceptable levels as listed in the Forest Plan.

c) Both National Forest and adjacent private land will be considered in the analysis of wildlife opening needs.

d) New wildlife openings will not be constructed in FIMU's, filter strips, or 8.2, 9.3 and 9.4, management areas.

e) No openings will be created on steep slopes or erosive soils where water quality impacts would occur. T by 2000 erosion standards would be observed in the creation, planting, and maintenance of new openings.

f) New wildlife openings should not be placed where they will be bisected by permanently open, gravel or paved roads.

g) When placing any new openings in riparian areas, openings will be located adjacent to uplands rather than located in the interior of riparian areas where at all possible.

B. The Forest Plan will be amended to include the following standards and guidelines for elimination of wildlife openings throughout the Forest.

1. Wildlife opening will be abandoned immediately in Lusk Creek, Bald Knob and Burke Branch. In the other six RARE II areas wildlife opening management will be abandoned within 5 years, pending Congressional action.

2. Openings identified for elimination will be abandoned rather than obliterated or reforested. No costly revegetation work would be undertaken unless needed for erosion purposes or to aid natural succession on specific sites.

3. The following are priorities where active management of openings would be eliminated. Maintenance of openings under priority "a" and "b" will be discontinued immediately. The schedule for eliminating openings under the other priorities will be determined through opportunity area analysis:

a) FIMU's in 9.3 management areas.

b) The core areas of 3.3 management areas (FIMU's outside 9.3 management areas).

c) Filter strips.

d) 9.3 Management Areas (Natural openings such as glades or barrens could continue to be managed to maintain opening conditions if recommended by IDOC or USFS Biologists. In accordance with the 9.3 management area decision, most openings can be maintained for the next 5 years).

e) Areas within 3.3 management areas (FIMU's) outside of core areas and up to 1/2 mile from the edge of the FIMU core.

f) Openings in all areas of the Forest which are bisected by permanently open, gravel or paved roads (These areas provide poor wildlife habitat due to human disturbances).

g) Openings identified in excess of the biological needs of management indicator species or other species of interest identified in the opportunity area scoping process as determined by the HEP modeling and aerial photo analyses.

h) Openings which can be combined to meet minimum size criteria for permanent wildlife openings or biological needs of management indicator species.

XII. AREAS PROPOSED FOR STUDY AS WILD AND SCENIC RIVER CANDIDATES

A. The Forest Plan will be amended to include Hutchins Creek from its intersection with Clear Creek to its source as a candidate Wild and Scenic River managed under prescription 9.2. The mapping and management of Hutchins Creek, where the corridor overlaps 9.3 management area boundaries, will retain the 9.3 management area designation.

B. The specific category for each river recommended as a candidate Wild and Scenic River has not yet been determined. This will be accomplished through the study of each river. The standards and guidelines for 9.2 management prescriptions will be reviewed for conformance with the provisions of the agreement between the USDA Forest Service

and American Rivers, Inc. Amendments will be made if needed to comply with the agreement. In considering needed amendments to the Forest Plan, standards and guidelines will retain eligibility for the "scenic" category for all candidate rivers, including Hutchins Creek.

C. The Forest Service agrees that an appropriate NEPA decision document will be issued.

D. The Forest Service agrees to consider the Sierra Club's comments as included in their Statement of Reasons for their Forest Plan appeal when the Forest Plan is reviewed for compliance with the American Rivers Inc. agreement.

XIII. NATURAL AREAS (8.2 MANAGEMENT AREAS AND INCLUSIONS)

A. The Forest Plan will be amended under Forest-wide standards and guidelines section 1900, under the topic "Special Features". The second paragraph on page IV-17 will read: "The environmental analysis of proposed management activities will include consideration of the effects on 8.2 management areas or inclusions. Management activities will be designed to avoid or mitigate significant adverse impacts to the recognized features and values of the site whenever possible.

B. The Forest Plan will be amended under Forest-wide standards and guidelines, section 1900, page IV-17, third paragraph, to read: "The boundaries for 8.2 management areas and inclusions will encompass, as a minimum, the area as mapped in the Illinois Natural Areas Inventory. Changes in area boundaries, values being protected, and the addition or elimination of areas will be accomplished through Forest Plan amendment."

XIV. TRAILS

A. The schedule of practices beginning on page IV-190 of the Forest Plan will be amended to show that scheduled trail construction is for non-motorized use. This amendment will show that the Forest Service does not intend to construct motorized trails during the next ten years, but leaves the option open for future development depending on how demand for motorcycle use or definitions of roads vs. trails may change.

The Forest Service does expect to construct some travelways for ATV use during the next ten years. The exact schedule for construction will be dependent on funding. These travelways will be short segments to connect existing roads in order to provide loops. However, because they will be designed for vehicles greater than 40 inches wide, the ATV travelways to be constructed will be designated as roads rather than trails.

B. The Forest Service agrees that it is desirable to construct more trail than that stated in the Forest Plan schedule, but also believes that the stated schedule reflects the realistic expected funding and accomplishment level for the Shawnee National Forest over the next 10 year period. Monitoring and evaluation of Forest Plan implementation will assess the ability to construct more trails than now scheduled in the Plan. The Forest Plan will be amended to schedule construction of more trail if additional funding becomes available or if the construction can be accomplished through volunteer efforts.

C. The Forest Service will aggressively pursue funding for meeting the Forest Plan trail construction objectives. This will include budget requests and encouragement of volunteer or cooperative

efforts, and utilization of available manpower programs.

D. The Forest Service will attempt to develop a Forest-wide trail plan within one year. This plan will show the corridor location for hiking and horseback trails and a priority for implementation. The Sierra Club and other interested groups, agencies, and individuals will be involved in the development and analysis of alternatives. The Forest Plan will be amended to include the approved trail plan. This will be considered input into the opportunity area analysis, when available. The Forest Service understands that Lusk Creek is one place on the Forest with high demand for trail opportunities. This will be considered in setting priorities for trail construction. Until the Forest-wide trail plan is completed, the need for and opportunity for trail construction will be determined through the analysis of each opportunity area as well as other input from user groups.

XV. ROADS

Table 4-30 of the Forest Plan (page IV-190) will be amended as shown below to display road obliteration as a scheduled practice, with 100 miles scheduled for both the first and second decades.

Mgt. Practice	Unit of Measure	1st Decade	2nd Decade
Road Obliteration	Miles	100	100

XVI. PLAN IMPLEMENTATION

A. The following will be added to the Forest-wide standards and guidelines on page IV-16 of the Forest Plan under the 1900 section, NEPA process: "The public will be promptly notified of decisions

to implement management practices and activities. Whenever possible, implementation will not occur until at least 30 days after the decision date. Decisions will be implemented sooner only when immediate action is necessary due to emergency situations, or when the action is a minor activity that has no potential for controversy."

B. For all projects, implementation will be in compliance with 40 CFR 1501.4(e)(2) which requires a 30 day review period for unprecedented actions or actions similar to those that normally require an Environmental Impact Statement; Executive Order 11988 and 11990 when the action involves floodplains and wetlands; and Forest Service Handbook 1909.15, Chapter 52, when the decision is based on an Environmental Impact Statement.

C. The Forest Service will continue to send written notification of decisions to those interested parties who have requested to be notified.

XVI. [sic] OTHER PROVISIONS AND AGREEMENTS

A. The appellants agree to the following:

1. The appeal (NFS #1861) filed by the Audubon Council of Illinois, Inc. and received on December 19, 1986 is hereby withdrawn.

2. The appeal ((NFS #1873) filed by E. Allan Englehardt and received on December 29, 1986 is hereby withdrawn.

3. The appeal (NFS #1883) filed by the Illinois Department of Conservation and received on January 5, 1987 is hereby withdrawn.

4. The appeal (NFS #1871 filed by the Sierra Club *et al* and received on December 24, 1986 is hereby withdrawn.

B. The Forest Service and the Appellants agree to the following:

1. That this agreement binds them only as provided herein and is entered into for the purpose of settling these appeals with respect to the Shawnee National Forest only, and for no other purpose.

2. That each appellant agrees not to initiate or pursue any further direct appeal or judicial review of the Shawnee National Forest Plan or environmental documents dated November 24, 1986.

3. That in the event any appellant or representative, or successor therefore initiates or pursues further direct appeal or judicial review of the Shawnee National Forest Plan or environmental documents dated November 24, 1986, any Forest Service agreement or obligation herein is discharged and void as to that appellant, however, each term and provision of this agreement shall remain valid and in full force as to all others.

4. That each appellant reserves any rights to initiate and pursue appeals or judicial review of any future Forest Plan actions, including future environmental documents relating to actions on the Forest, on the basis of issues other than specific claims raised in the appeal of Shawnee National Forest Plan or environmental documents dated November 24, 1986. That any further appeal or judicial review instituted or pursued by an appellant realleging any claims raised in this appeal, hereafter withdrawn, voids any Forest Service agreement or obligation as to that appellant.

5. That in the event the Forest Service does not amend the Forest Plan as provided herein, this agreement shall be null and void and all obligations under it discharged.

6. That if any part of this agreement shall be determined unlawful by a court of competent jurisdiction, all other lawful terms shall remain in force, unless the entire purpose of the agreement is frustrated hereby.

7. That this agreement shall terminate upon revision of the Shawnee National Forest Plan pursuant to 36 CFR 219.10 (g) (1982) or succeeding regulations.

8. That any intervenor in the proceeding may elect to endorse this agreement and be bound by it.

9. That this settlement may be modified by mutual consent of the appellants and the Forest Service.

10. That this settlement document shall be made part of the Record in the current appeals (NFS #1861, NFS #1871, NFS #1873, and NFS #1883).

11. That the Forest Service and representatives of the organizations which took part in the settlement agreement discussions will meet at least annually. Meetings may occur more frequently than once a year if necessary. The annual meeting will occur early in the fiscal year following a 30 day notice. The intent of the meeting is to review implementation of the Plan through IBM, plan monitoring and evaluation, proposed amendments and the annual budget. The Shawnee National Forest will host the meeting and develop the agenda.

Signed for the USDA-Forest Service:

_____ _____

FLOYD J. MARITA
Regional Forester, Region 9 Date

_____ _____

RODNEY K. SALLEE
Forest Supervisor,
Shawnee National Forest Date

Signed for the Appellants:

Signed for the Audubon Council of Illinois:

_____ _____

JAMES O. SMITH
President, Audubon Council
of Illinois Date

Signed for the Illinois Department of Conservation:

_____ _____

MARK FRECH
Director, Illinois Department
of Conservation Date

Signed for E. Allan Englehardt:

_____ _____

E. ALLAN ENGLEHARDT Date

Signed for the Sierra Club:

_____ _____

EVAN L. KURRASCH
Chair. Great Lakes Chapter,
Sierra Club Date

Signed for the Association of Concerned Environmentalists, Friends of the Earth, International Wildlife Coalition, Illinois South Project, McHenry County Defenders, The Wilderness Society, and Illinois Audubon Society:

_____ _____

JIM BENSMAN
Chair, Shawnee Appeal
Committee

Date